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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 712

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,
Petitioners,

—v.—

WILLIAM S. RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF THE STATE OF WEST VIRGINIA, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States District Court for the Southern District of West Virginia (App. 35a-59a),[1] is reported at 314 F. Supp. 20 (1969). The opinions of the United States Court of Appeals with the dissent of Judges Sobeloff and Winter from the denial of rehearing *en banc* (App. 65a-66a, 69a-78a) are reported at 429 F.2d 423 (1970).

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[1] The Single Appendix separately filed in this case is designated herein "App." The Appendix of statutes and regulations attached to this brief is designated "Br. App." Portions of the record not printed in the Appendix are referred to by their original exhibit number.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered May 14, 1970 and the petition for rehearing denied July 14, 1970. The petition for a writ of certiorari was filed in this Court on September 17, 1970, and granted on December 21, 1970. This Court's jurisdiction derives from 28 U.S.C. §1254(1).

Question Presented

Petitioners, residents of the black ghetto of Charleston, West Virginia, have been or will be displaced from their homes by the construction of a federally aided interstate highway. They are required to obtain new housing in a market from which they are excluded because of racial discrimination and a shortage of low cost housing. This case presents the fundamental constitutional question of whether the Fourteenth Amendment requires that when persons are removed from housing by state and federal action and thereby subjected to private housing discrimination, government officials must first make relocation housing available to them without regard to race or economic status.

Additionally, petitioners are among the class of persons protected by the amendments to the Federal-Aid Highway Act of 1968, 23 U.S.C. §501 et seq., which requires adequate assurances of relocation housing prior to their displacement by highway construction. Relying on a subsequently amended regulation, the United States Department of Transportation and the State Road Commission refused to provide such assurances, and the district court denied relief. The Court of Appeals affirmed, notwithstanding an intervening change in the regulations sustaining petitioners' position.

Under these circumstances, and especially where a precise statutory remedy is available to cure a constitutional wrong, are petitioners entitled to the relief the Constitution requires and Congress has provided, but which neither the administrative agencies nor the lower courts have afforded to them?

Constitutional, Statutory, and Regulatory Provisions Involved

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

This case also involves various provisions of Title 23 of the United States Code (Highways), in particular, former §133 (repealed effective July 1, 1970, Pub. L. 90-495, §37, Aug. 23, 1968, 82 Stat. 836) (Br. App. 1-2); Pub. L. 89-574, §12, Sept. 13, 1966, 80 Stat. 770 (Br. App. 2-3); the Federal-Aid Highway Act of 1968, 23 U.S.C. §501, et seq. (Br. App. 4-13); the Federal-Aid Highway Act of 1970, Pub. L. 91-605, §117 (Br. App. 13-15); and the Fair Housing Act of 1968, 42 U.S.C. §3601 et seq., particularly §3608 (Br. App. 16).

This case also involves the following regulations and policy directives issued by the Department of Transportation:

(1) Circular Memorandum, January 23, 1968 (Pl. Ex. No. 9, App. 79a-81a).

(2) Instructional Memorandum, 80-1-68, ¶¶1; 2; 3; 4; 5; 6; 7; 9a, c, and g; 11; 12; 13; and 17c, f, g, and h; September 5, 1968, as amended (Br. App. 17-36).

(3) Circular Memorandum, December 26, 1968 (Br. App. 37-38).

(4) Circular Memorandum, February 12, 1969 (Br. App. 39-40).

(5) Memorandum on Implementation of Replacement Housing Policy issued by Secretary of Transportation John A. Volpe, January 15, 1970 (Br. App. 41-42).

(6) Circular Memorandum, March 27, 1970, as amended, April 10, 1970 (Br. App. 43-44).

(7) Memorandum of Under Secretary of Transportation James M. Beggs, issued November 6, 1970 (Br. App. 45-46).

Statement

Introduction.

This action involves the right, under the Constitution and federal statutes and regulations, of persons who are displaced by the construction of a federal highway to be relocated by the responsible state and federal agencies into decent, safe, and sanitary housing. The case arises in the context of a highway, to be built through the Triangle section of Charleston, West Virginia. In the Federal-Aid Highway Act of 1968, Congress addressed itself to the serious problems of persons whose homes were destroyed by highways in finding new housing. Sections 502 and 508 require the Secretary of Transportation and the states to develop, enforce and implement relocation plans which would in fact result in the availability of adequate housing for displacees. 23 U.S.C. §502, 508.

Thus, the central statutory issue in this case is whether the 1968 Act and regulations promulgated under it by the Department of Transportation impose obligations towards persons faced with displacement after its enactment by a highway project commenced before its enactment. In addition, this case raises a broader constitutional issue: the right under the Fifth and Fourteenth Amendments of black and poor white persons to assured relocation housing when forced by highway construction to seek new homes

in a housing market restricted because of racial discrimination and high prices.

The following statement will be divided into two main parts. The first will describe the factual setting of the case, i.e. the history of the I-77 highway project, its relationship to the statutes and administrative regulations, and the problem of finding adequate relocation housing in Charleston, West Virginia, as it relates particularly to the situation of people who are poor and black. The second will detail the proceedings in the courts below. As this case requires a somewhat detailed description of the history of Interstate Highway 77 and its relationship to the events in this lawsuit and relevant statutes and regulations, we have set out in the margin a table outlining the sequence of events with which we are concerned.[2]

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[2] The following are the dates of the pertinent events involved in this case:

1. August 31, 1964: Present route of I-77 approved by Federal Bureau of Public Roads.

2. April, 1966-May, 1967: Federal authorization to acquire land on highway right-of-way given.

3. August 23, 1968: Enactment and effective date of 1968 Federal-Aid Highway Act.

4. September 5, 1968: Issuance of implementing regulations by the Department of Transportation (IM 80-1-68).

5. December 3, 1968: Present suit filed.

6. April 2-3, 1969: Hearing in the District Court.

7. July 18, 1969: Order entered dismissing complaint.

8. Fall, 1969: Federal authorization for construction of I-77.

9. January 15, 1970, and March 27, 1970: Issuance of new relocation requirements by the Department of Transportation.

10. May 14, 1970: Opinion of Fourth Circuit Affirming Dismissal.

11. July 10, 1970: Federal order halting work on I-77 pending reconsideration of route.

12. July 14, 1970: Denial of Rehearing *en banc*.

13. November 6, 1970: Federal authorization to proceed with construction issued.

14. December 21, 1970: Certiorari granted.

A. Summary of Facts.

1. *Charleston, West Virginia, and the Triangle.*

Charleston, the capital and largest city of West Virginia, lies in a narrow valley, along the Kanawha River, and is bisected on the east by the Elk River, which joins the Kanawha near the center of the city. Because the hills rise steeply from both river valleys, there is a "sparsity of flat land" in the city for any type of development.[3]

The Triangle district, located along the south side of the Elk near its mouth, is the oldest and largest predominantly Negro community in the state. Many of its residents are elderly; almost all have comparatively low incomes.[4]

Urban housing shortage, common in many cities, is particularly severe in Charleston, partly because many homes have been demolished for public projects.[5] The impact in

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[3] App. 421a; 419a.

[4] In 1966, the average annual household income for blacks in the city was more than $3000 below the average income of white households, a fact resulting largely from job discrimination (Pl. Ex. No. 14, p. I-D-6.) The district court took note of this fact. App. 36a, 314 F. Supp. at 21.

[5] From 1960 to 1966 approximately 1900 low cost housing units were destroyed, while in the same period the only low cost housing constructed has been 100 units of public housing for the elderly, while 1500 middle to upper income units were privately constructed. App. 300a.

In 1966, a study prepared for an urban renewal program estimated that total displacements to be caused by public projects in Charleston would be:

Highway Construction	1094
Urban Renewal	755
State Capital Expansion	280
Disaster, Condemnation and Conversion	750
Total	2879

Pl. Ex. No. 14, p. I-D-14. These figures represent family units, and thus the total number of persons is far greater. The planned urban renewal project was postponed.

the Triangle is even more severe. Land clearance for a proposed expansion of a local water company, east of the highway route, displaced 243 persons a few years ago.[6] The planned highway will remove the homes of about 300 more. The proposed urban renewal project, which has been postponed indefinitely, largely because of the lack of replacement housing, will, when added, displace almost all of the district's 2000 residents.[7]

Housing discrimination exacerbates the effect of this situation on black citizens.[8] Private discrimination has concentrated Negroes in only a few areas of the city; the Triangle is the largest.[9] As a result, black persons do not have the same opportunities for finding relocation housing in the private sector as whites.[10]

This situation was recognized by the federal highway officials in studies of relocation problems made in early 1968, before dislocation had begun. The division right-of-way officer reported on February 20, 1968:

> . . . [O]ur major area of concern lies with those people who have income over and above that which would qualify them for public housing and desire to rent. More specifically, this area would be defined as families, with average annual incomes of from $5000

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[6] Def. Ritchie Ex. No. 1; App. 100a.

[7] *Ibid.;* Pl. Ex. No. 14, 16, 24.

[8] This, of course, is in addition to the difficulties arising from the lower incomes of blacks. See N. 4, *supra.*

[9] Pl. Ex. No. 23.

[10] App. 304a-306a; 331a-338a; Pl. Ex. No. 25.

A community worker who made a survey of fifty homes listed as available for relocation by the State Road Commission found that of those available and within the financial capability of Triangle residents, only eight would rent to Negroes. App. 332-335a; Pl. Ex. No. 25.

> to $7500 a year and who do not want to, or cannot, buy their own home. Urban renewal and public housing is of little value to our relocation problem in these cases, and *I have reason to believe that the private housing market is about saturated presently.*[11]

He underscored his concerns again on February 26, 1968:

> It appears that the relocation problem in the Charleston area, insofar as the State Road Commission is concerned, could become critical in the not too distant future due primarily to the apparent lack of rental property in the $60-$90 per month price range. The available replacement housing in this area is being depleted and no new sources are available at this time.[12]

Less than 10 days later, on March 6, 1968, after meeting with State Road Commission, Federal Housing Administration and Urban Renewal officials, the division right-of-way officer again expressed alarm that the housing market was being depleted:

> It appears that the Federal Housing Administration programs will provide the only source of replacement housing in the area. The existing private market, particularly in low to moderate priced rentals, is being depleted primarily by Interstate acquisition. It also appears that future authorization for acquisition will be affected unless the Federal Housing Administration programs are instituted in the very near future.[13]

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[12] Pl. Ex. No. 12, App. 93a.

[11] Pl. Ex. No. 12, App. 87a (Emphasis added).

[13] Pl. Ex. No. 12, App. 97a-98a. The urban renewal program then contemplated was not approved, with the result that the additional housing it would provide never came into being.

At trial, the division engineer was asked whether the facts described in the right-of-way officer's February and March, 1968 evaluations had changed during the year. The only change he could cite was the availability of rent supplements, provided for under 23 U.S.C. §506(b).[14]

2. *I-77 and the Highway Approval Process.*

The section of I-77 at issue here is part of the interstate highway system.[15] Routes 64 from the west and 77 and 79 from the north meet on the north bank of the Elk River, crossing southeasterly through the Triangle and the rest of the city as I-77.[16] While several alternative routes were originally considered, at least one of which would have avoided heavily populated areas,[17] the state proposed the

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[14] App. 424a-427a. He emphasized this by saying: "I'm not at all sure they could have gone through with the relocation program in the area . . . without these rental supplements." App. 427a. He was unable to say what relief would be available when the rent supplements, which have a statutory limit of two years, expired for families placed in housing more expensive than they could afford. App. 428a.

[15] The responsible federal agency is the Department of Transportation (DOT), acting through the Federal Highway Administration and the Bureau of Public Roads. Most of the operative work is carried on by state agencies, in this case the West Virginia Department of Highways (formerly the State Road Commission of West Virginia). The governing federal statute is Title 23 of the United States Code. The regulations in part are in 23 C.F.R., but are primarily found in various types of memoranda (instructional, policy and procedure, or circular) issued by DOT.

The process by which these interstate roads are built involves both state and federal agencies. The federal government finances 90% of the cost of an interstate highway, while the planning and construction of highways are state responsibilities. The states choose the system of routes for development, select and plan the individual projects to be built, acquire rights-of-way, and supervise the construction contracts. Thus, the federal agencies finance the road building, and exercise a veto power over the state's activities.

[16] App. 41a, 314 F. Supp. at 24; App. 109a, Def. Ritchie Ex. No. 1.

[17] App. 421a.

present route in 1964, and it was approved by the Bureau of Public Roads on August 31, 1964.[18] Federal authorization for right-of-way acquisition was given between April, 1966, and May, 1967.[19] *As of the effective date of the relocation amendments to the Federal-Aid Highway Act, 23 U.S.C. §501 et seq., and indeed, at the time of trial in this case, the final step in the approval process, authorization of construction, had not yet been given.*[20] Under that statute, the Secretary is obliged to require "satisfactory assurances" of the availability of adequate relocation housing before he may approve projects under 23 U.S.C. §106.[21]

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[18] App. 41a-42a, 314 F. Supp. at 24. On July 10, 1970, as a result of a public demonstration, a resolution by the City Council and a recommendation by James D. Braman, Assistant Secretary of Transportation for Environment and Urban Systems, all advocating a shift of the route one block east into land previously cleared by the water company but not being used, in order to lessen the impact on the residents, Secretary of Transportation John A. Volpe ordered work on the road to cease, while the route was reconsidered. New York Times, July 13, 1970, p. 62, col. 1. On November 12, 1970, Undersecretary of Transportation John M. Beggs announced that the route was reaffirmed, and authorized construction to proceed. Br. App. 45-46; Charleston (W. Va.) Gazette, November 13, 1970, p. 1.

[19] App. 42a-43a; 314 F. Supp. at 24.

[20] App. 132a-137a.

[21] In the past, "plans, specifications and estimates" were required for actual construction only, since costs of acquiring right of way were ineligible for federal contributions. 42 Stat. 212. Thereafter, when acquisition costs became eligible for federal contribution, 50 Stat. 838, the submission and approval of plans, specifications and estimates were administratively divided into two major stages: the right of way acquisition stage and the construction stage. *DOT Policy and Procedure Memorandum 21-5.* (Hereinafter "PPM.") Right of way *clearance* is considered part of the construction stage. *PPM 21-12.* Following the approval of plans, specifications and estimates for a given stage, federal and state highway officials enter into project agreements limited to such stage. *PPM 21-7.* The approval of the construction stage is the final approval given by the DOT.

In the Triangle district itself, only 9 of the 65 parcels to be acquired had been optioned to the State Road Commission prior to August 23, 1968, the effective date of the 1968 relocation amendments. Between then and the time of trial, April 2, 1969, nine additional parcels had been optioned and one condemnation action had begun.[21a] As of February 28, 1969, shortly before trial, only 17 households had been moved and some 282 persons remained to be dislocated.[21b] At the time the appeal was argued before the Court of Appeals in May, 1970, petitioners counted 262 persons remaining in the right-of-way. Following the Court of Appeals' affirmance, displacement accelerated and, by July, when the petition for rehearing was denied, 189 persons (150 by federal defendants' count) remained. A survey taken by petitioners on December 22, 1970, indicated that 65 persons and 14 businesses had not yet been moved. The state respondents assert that on January 28, 1971, 35 individuals and 5 businesses remain.[22]

3. *The 1968 Relocation Amendments to the Federal-Aid Highway Act and the Administrative Regulations to Implement Them.*

Prior to 1962, there was no provision to grant assistance to persons displaced by federally aided highway construction, beyond the right they might have under state law relating to condemnation by public agencies. In that year, Congress enacted 23 U.S.C. §133, requiring the states to provide "relocation advisory assistance" to dislocatees and authorizing relocation payments to cover moving expenses,

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[21a] Pl. Ex. No. 4.

[21b] *Ibid.*; Def. Ritchie Ex. No. 1, App. 99a-101a.

[22] Response of Respondents Ritchie, et al. to application for injunction filed in this Court January 30, 1971.

where "authorized by State law." Several studies[23] showed these provisions to be inadequate, as highway officials were not obliged to curtail their displacement activities even if they knew that relocation resources were not available.[24] Congress responded to the deficiency in the Federal-Aid Highway Act of 1968. The new law not only required the payment of a variety of relocation allowances, which the states were obliged to permit no later than July 1, 1970, 23 U.S.C. §§505-507, but also a program which assures the actual availability of adequate relocation housing for displaced persons, 23 U.S.C. §502 and §508.[25] Section 502 requires the Secretary of Transportation to police the adequacy of state relocation programs, and prohibits him from approving any project unless he receives "satisfactory assurances" that relocation assistance and adequate relocation housing are available. Section 508 requires the state to ascertain the relocation needs of those to be displaced and to assure that an adequate amount of satisfactory relocation housing is available.

Under the rule making authority authorized by the statute, 23 U.S.C. §510(b), the Secretary has undertaken to define the statutory term "satisfactory assurances." Instructional Memorandum (IM) 80-1-68 issued September 5,

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[23] See *infra* at Br. App. 48-50.

[24] The regulations under section 133 required state highway departments to compile information about available public and private housing opportunities. PPM 80-5(3)(f) 4 and 5.

[25] The Act was specifically made effective on the date of its enactment, August 23, 1968, except to the extent that states were unable to comply because of local law, and fully applicable on July 1, 1970. Pub. L. 90-495, §37, set out as note under 23 U.S.C. §502.

West Virginia amended its laws to permit full compliance on March 7, 1969, prior to the hearing in the District Court. W. Va. Code Ch. 17, Art. 2A, Sec. 20.

1968,[26] sets out in detail what is required. The key requirement is that state highway departments prepare relocation plans presenting relevant factual data pertaining to relocation housing problems and their solutions, which must be approved by federal officials prior to right of way acquisition and/or construction.[27] The federal officer must then review the plan to determine whether it "is realistic and is adequate to provide orderly, timely and efficient relocation of displaced individuals and families" to satisfactory housing available without regard to race "with minimum hardship on those affected." [28]

A Circular Memorandum (CM) issued by the Bureau of Public Roads on February 12, 1969, shortly before the trial in this case, stated that the state should undertake the planning required by IM-80-1-68 "on all active projects to the extent that it is reasonable and proper," and that to determine this, the local federal officials should review each project to determine the extent of dislocation remaining, and to require the planning information where "a substantial number of persons remain to be relocated." [29]

While this case was pending before the Court of Appeals, new relocation instructions were issued by DOT. These were ordered by the Court to be filed as part of the record, one month prior to argument.[30] The changes were ordered by Secretary Volpe in a memorandum issued January 15, 1970, requiring: "Specific written assurances that adequate replacement housing will be available or provided for" before approval of all projects and that construction

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[26] As amended, Br. App. 17-36.

[27] IM 80-1-68, ¶7, Br. App. 25-27.

[28] *Id.* ¶5a(5), Br. App. 21.

[29] Br. App. 39-40.

[30] App. 63a-64a; see also App. 77a, 429 F.2d at 426.

"be authorized only upon verification that replacement housing is in place and has been made available to all affected persons." [31] The Federal Highway Administration implemented this on March 27, 1970, in a memorandum applicable to all projects authorized after May 1, 1970, and to all previously authorized projects on which persons were not yet displaced on that date, and requiring that federal officials "shall not authorize any phase of construction . . . which would require the displacement of individuals or families", or permit any other dislocation until the person has obtained for himself or has been offered by the state adequate replacement housing immediately available.[32] In affirming the district court's judgment, the Court of Appeals made no reference to the existence or impact of these new requirements.[33]

4. *The Relocation "Program" in the Triangle.*

Prior to the relocation amendments, and on the basis of the DOT study on relocation which had been submitted to Congress, the Director of Public Roads issued a memorandum on January 23, 1968, to his regional and state administrators directing that relocation problems be studied and considered more intensively.[34] Specifically noting that legislation was not needed to implement certain aspects of the study, he stated that "the relocation plan concept should be implemented particularly in an urban area where there is a large number of families and businesses to be dislocated." [35]

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[31] Br. App. 41-42.

[32] Br. App. 43-44.

[33] *Cf.* App. 76a-77a, 429 F.2d at 425-426, Sobeloff and Winter, JJ., dissenting from denial of rehearing *en banc*, and discussion *infra* at 19-20, 35-37.

[34] CM January 23, 1968, App. 79a-81a (Pl. Ex. No. 9.)

[35] *Id.* at 80a-81a.

Studies made by the federal officials in response to this directive indicated that relocation housing in Charleston was in fact inadequate to meet the needs of highway displacees.[36] Although the federal division engineer concluded on March 25, 1968, that the State had not satisfactorily dealt with this problem,[37] no remedial action was required.[38] It was considered sufficient to rely on general assurances and evidence from past performance.[39]

Solely in response to this lawsuit,[40] the State Road Commission prepared a so-called "relocation plan" for the Triangle.[41] Although the federal officials requested and obtained a copy of it, they made no attempt to review it, as the regulations require.[42]

The plan establishes that the overwhelming majority of Triangle residents are tenants and are poor, with aver-

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[36] See *supra* pp. 6-9.

[37] He wrote:

> In the Charleston area the State did secure valuable information relative to persons to be dislocated by a survey which was a valuable assist in defining the overall problem involved. It would not be considered, in our opinion, a complete relocation plan since it did not provide information either factual, estimated or projected as to the availability of replacement housing.

Pl. Ex. No. 9, App. 83a. See also App. 167a-168a.

[38] App. 168a.

[39] App. 150a-151a; 198a-199a; 226a-227a; 384a-386a; 415a-416a.

[40] App. 386a.

[41] Def. Ritchie Ex. No. 1; App. 99a-126a.

[42] IM 80-1-68, ¶7b.

The right-of-way officer stated, "I have not had occasion to review it in any depth. . . . I have seen it. That's about all." App. 209a. See App. 407a-408a.

age rentals about half those in the city as a whole.[43] While containing voluminous but misleading statistics about public housing in the city,[44] it only asserted vaguely that the majority of displacees in the Triangle "appear to be eligible for public housing."[45] It contains no information regarding the effects of racial discrimination on the availability of housing.[46] *Most important, the plan treats the Triangle in isolation, and makes no attempt to consider the competing and simultaneous needs of the several hundred persons outside the Triangle who would be displaced by the same highway nor those who would lose their homes from other causes.* State Road Commission officials did not consider competition to be relevant.[47] As recognized by the Department of Transportation in its regulations,[48] competition for

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[43] App. 101a.

[44] The plan relies on the "turnover" rate in public housing, a standard discredited in relocation planning, does not consider the needs of other highway displacees from outside the Triangle, and makes no finding that residents are indeed eligible under housing authority requirements. See *infra* at 47-50.

[45] App. 102a.

[46] The state officers relied on the Charleston fair housing ordinance to support their view that discrimination was not a factor. The ordinance, however, does not cover two or three family units or four family owner occupied units. App. 392a. A survey taken by a community worker of the housing on a list furnished by the Road Commission to displacees, showed that over half had been already rented, and that only eight of those remaining were available to blacks. App. 332a-334a; Pl. Ex. No. 25.

[47] App. 395a.

[48] IM 80-1-68 ¶7b(3)-(b)e(c) Br. App. 27.

available units is obviously highly relevant in relocation planning.[49]

B. Summary of Proceedings in the Courts Below.

This action was filed in the United States District Court for the Southern District of West Virginia on December 3, 1968, three and one-half months after the enactment of the relocation amendments to the Federal-Aid Highway Act, as a class action on behalf of all persons living in the interstate corridor in the Triangle and threatened with displacement by the highway.[50] It challenges the failure of federal

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[49] Petitioners have deliberately confined their discussion of the facts to those in the record as developed at trial and as presented to the Court of Appeals. They are aware of the data relating to relocation that has been presented to this Court by the state in its response to petitioners' motion for a stay injunction. They urge, however, that this data not be considered here in deciding the case in chief for a number of reasons.

Clearly, most, but not all, of the Triangle residents have been uprooted and relocated someplace. But this Court does not sit as a trial court to make findings regarding the factual dispute in this case, *viz.*, whether people have been relocated to decent, safe, and sanitary housing as required by federal statute. It surely cannot make such findings on the basis of *ex parte* and self-serving presentations by one of the parties.

With regard to the constitutional issue, the fact that persons have been relocated somewhere does not mean they have been relocated on a racially nondiscriminatory basis. Placing blacks into one ghetto from another does not satisfy the dictates of the Fourteenth Amendment, or federal law. *Shannon* v. *Dept. of Housing and Urban Development*, —— F.2d —— (3rd Cir. Dec. 30, 1970, No. 18397.) The factual questions of how people were moved and to where should be resolved by the district court on remand after decision by this Court of the legal issues presented by petitioners and according to valid standards and procedures.

[50] Plaintiff-petitioners Keith Kincaid, Tennis Hogans, Robert Bayes, Katie Dean, Sedalia Hayes and Lillian Day were all residents of the corridor at the time the action was filed. The last named, Lillian Day, is white, and represents the interests of low-income white displacees. They are joined by the Triangle Improvement Council, an organization representing the Triangle community, and its officers.

and state officials to assure, in accordance with the relocation housing requirements of the 1968 amendments and the equal protection clause of the Fourteenth Amendment, the availability of relocation housing on a non-discriminatory basis for persons evicted from their homes by highway construction.[51] The defendant-respondents are the federal and state officials responsible for the construction of the highway.[52]

To prepare for trial, plaintiffs sought discovery of pertinent administrative documents from the agencies. The district court refused to permit any discovery.[53] Following the hearing on plaintiffs' motion for a preliminary injunction, the case was submitted on the merits.

In its opinion, the court ruled preliminarily that the defendants' objections to reviewability and standing were not well founded, as the Administrative Procedure Act, 5 U.S.C. §701 et seq. authorized judicial review, and the plaintiffs were "persons affected" by the agency's actions.[54] On the merits, however, it dismissed, accepting the defendants'

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[51] The complaint (App. 9a-21a) also challenged the adequacy of public hearings on the highway route and the failure of federal and state highway officials to consider the adverse social effects of the highway as required by 23 U.S.C. §128. Prior to the hearing on the motion for a preliminary injunction, the district court limited petitioners' proof to the problem of relocation housing (App. 27a; 39a-40a, 44a-45a; 314 F. Supp. at 22, 23, 25.) This limitation on petitioners' proof, in effect a partial summary judgment made without any proceedings to determine whether triable issues of fact existed, was not appealed.

[52] The City of Charleston and its officials were also named as defendants because of their involvement in various programs affecting housing. Although they participated in the trial, they did not appear in the Court of Appeals, and have not yet participated in the proceedings in this Court.

[53] App. 38a-39a; 314 F. Supp. at 22-23.

[54] App. 46a-49a; 314 F. Supp. at 26-28.

interpretation of the statute, suggested by paragraph 5b of IM 80-1-68, that the requirements for "satisfactory assurances" of relocation housing, and particularly for a relocation plan, do not apply to projects, like this one, where authority to acquire right-of-way preceded the 1968 Act. Without discussing in any detail petitioners' contention that this interpretation undermined the clear intent of Congress, the court held that it had a rational basis, and should not be disturbed, relying on *Udall* v. *Tallman,* 380 U.S. 1 (1965). Finally, although the federal agencies had contended they were not obliged, in this circumstance, to review the adequacy of relocation housing, the court undertook independently to make that determination. On the basis of assurances that the relocation requirements would be met, it "assume[d] that the highway officials gave these assurances in good faith," and found that "adequate relocation housing, on an open racial basis, will be available in Charleston for an orderly relocation of the displacees from the interstate corridor." [55] Apparently from the testimony relating to the relocation plan prepared for the litigation, and the plan itself,[56] it found "that there is ample public housing in the Charleston area to accommodate the limited number of individuals remaining in the I-77 corridor in the Triangle area." [57] On the basis of these findings, it dismissed the constitutional claim, holding that there was no racial discrimination in the provision of relocation housing to Negroes.

While the appeal was pending in the Fourth Circuit, the Department of Transportation issued memoranda on relocation policy which altered the requirements of the earlier

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[55] App. 56a-57a; 314 F. Supp. at 30-31.

[56] See *supra* at 15-17.

[57] App. 57a; 314 F. Supp. at 31.

regulations and went far toward accepting petitioners' interpretation of the Act. These documents[58] were ordered to be filed as part of the record on appeal.[59] Despite this fact, and petitioners' supplemental brief and oral argument which discussed them, the court made no reference to them in its one sentence affirmance "on the opinion of the district court." [60]

In their petition for rehearing with a suggestion for rehearing *en banc*, petitioners asserted that the district court's opinion could not properly be affirmed in light of the change in the Department's view of the law, since the lower court's ruling had specifically been based on the prior administrative interpretation, relying principally on this Court's opinion in *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969). Rehearing was denied, again without explanation.[61] A dissenting opinion by Judge Sobeloff, joined by Judge Winter, did suggest the reasoning of the Court and the majority.[62]

SUMMARY OF ARGUMENT

I

The record in this case reveals both racial discrimination and a shortage of low cost housing in the Charleston housing market. State and federal action which displaces black and poor persons into such a market constitutes a violation of the Fifth and Fourteenth Amendments, since it results

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[58] See *supra* at 13-14.

[59] App. 63a-64a.

[60] App. 65a-66a; 429 F.2d 423.

[61] App. 71a; 429 F.2d at 423.

[62] App. 72a-78a; 429 F.2d at 423-426. See *infra* at 35-37.

in a denial of equal protection through the combination of state and private action. This position is supported by decisions of this Court as well as those of lower federal courts in directly analogous circumstances (24-26).

II

A. A constitutional determination is not, however, necessary to the decision of this case, as Congress has provided a statutory remedy to insure that all persons displaced by federally-aided highway construction are provided with adequate replacement housing, in the relocation provisions of the 1968 Federal-Aid Highway Act. The language of the statute and its legislative history indicate clearly that Congress intended it to be fully effective immediately. Any interpretation delaying its effectiveness or diluting its benefits conflicts with Congressional intent (27-30).

By regulation, the Department of Transportation has implemented the statute by requiring comprehensive relocation planning in order to determine before displacement the needs of those whose homes will be destroyed and the resources available to meet those needs. By a technical restriction contained in its own regulation, the Department determined that such planning was not required in the Triangle because authority to acquire right-of-way had been given before the effective date of the statute, although only a small number of persons had actually moved before that date. The district court accepted this limitation as valid, although it conflicts with the legislation it purports to enforce, and indeed with other portions of the same regulation (30-35).

While this case was pending in the Court of Appeals, the Department issued new relocation guidelines which substantially modified the previous limitations and partially

adopted petitioners' interpretation of the statute. The Court of Appeals erred in failing to take note of the impact of this change in the law. *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969). Those guidelines do not, however, yet fully implement the statute (35-37).

B. Insofar as they did purport to require assurances of adequate relocation housing for petitioners, the state and federal officials failed to comply with procedures mandated by law, relying solely on vague and unsupported assertions. Where an agency is effectively given the task of policing itself, in possible conflict with its primary function of building roads, has no internal review procedures for persons aggrieved by its actions, and has demonstrated impatience with those who question its conduct, a reviewing court should carefully scrutinize the administrative procedures. The district court erred in failing to review the entire record to determine whether the agency's conclusion was in fact supported by substantial evidence, and in relying instead on vague tests and oral assurances made during trial, which had no factual underpinning. Moreover, in making the ultimate factual determination itself the court usurped what should properly be an administrative function (38-46).

The district court's finding that relocation housing in Charleston was adequate to meet the needs of petitioners, in addition to being improperly made, is clearly erroneous. The court did not require the agencies to supply the information necessary to support that conclusion, and the bulk of the evidence which was presented contradicts it. The finding that public housing alone would be ample fails to consider the factors of competing displacement, and actual eligibility for public housing, and erroneously determines the availability of such housing (46-49).

III

A remedy should be afforded to petitioners which will insure that all those who are entitled to the protections of the 1968 relocation amendments, both those who are yet to be moved and those who have been displaced into demonstrably inadequate housing, are afforded the benefits which Congress intended them to have (50-52).

ARGUMENT

I

The Displacement of the Black Petitioners Into a Racially Discriminatory Housing Market Without Adequate Governmental Measures to Assure Non-Discriminatory Relocation Housing Deprives Them of the Equal Protection of the Laws Guaranteed by the Fourteenth Amendment.

As the record in this case demonstrates, construction of I-77 through the Charleston Triangle has had and will have the effect of displacing black and poor residents of the area and throwing them into a highly constricted, racially discriminatory housing market.

We may assume *arguendo*, that the discrimination of the housing market represents private decision making to exclude Negroes from areas reserved for whites, and poor persons from those reserved for the more wealthy, and not state action at the point of purchase and rental.[62] Nevertheless, it is state action which has uprooted the black and poor plaintiffs by destroying their homes, and placed them at the mercy of the racial discrimination and high prices in such housing as remains in Charleston.

Such governmental action, we submit, violates the Fifth and Fourteenth Amendments to the United States Constitution, although at the point of impact, private action is also present. While "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations

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[62] Insofar as the discrimination is based on race, it is of course prohibited by federal law. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

has been found to have become involved in it," *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), *Turner* v. *City of Memphis*, 369 U.S. 350 (1962), the State and federal governments here are significant moving forces.

The question is not novel. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968) holds that governmental relocation which puts minorities at the mercy of discrimination in the housing market violates the equal protection clause:

> What plaintiffs' complaint alleges, in substance, is that in planning and implementing the Project, the local defendants did not assure, or even attempt to assure, relocation for Negro and Puerto Rican displacees in compliance with the Contract to the same extent as they did for whites; indeed, they intended through the combination of the Project and the rampant discrimination in rentals in the Norwalk housing market to drive many Negroes and Puerto Ricans out of the City of Norwalk. The argument is that proof of these allegations would make out a case of violation of the equal protection clause. We agree.

Id. at 930. The court also made clear the importance of recognizing the realities of private discrimination:

> It is no secret that in the present state of our society discrimination in the housing market means that a change for the worse is generally more likely for members of minority races than for other displacees. This means that in many cases the relocation standard will be easier to meet for white than for non-white displacees.

Id. at 931. Similarly in *Arrington* v. *City of Fairfield*, 414 F.2d 687 (5th Cir. 1969), where state action was involved

in the destruction of the homes of Negroes by a private builder, "the fact that the decision to discriminate may be made by private individuals rather than a public official is not decisive," since, "the City may involve itself in the discriminatory operation of the private housing market." *Id.* at 692-93.

Such a view of the law is, of course, consonant with numerous other cases which find denial of equal protection of the law in a combination of governmental and private action, e.g. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), (court enforcement of privately agreed upon restrictive covenants); *Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963) ("convictions cannot stand, even assuming . . . that the manager would have acted as he did independently of the existence of the ordinance"); *cf. Garner* v. *Louisiana*, 368 U.S. 157, 176 (1961) (Douglas, J., concurring); *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).[44]

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[44] Additionally, the failure of the federal officials to take into consideration the discriminatory effects of their programs is a violation of the Fair Housing Act of 1968, which requires all executive departments to act "affirmatively" so as to further the national policy of fair housing. 42 U.S.C. §3608(e), Br. App. 16. See *Shannon* v. *Department of Housing and Urban Development*, —— F.2d —— (3d Cir., Dec. 30, 1970, No. 18397). Cf. *City of Chicago* v. *F.P.C.*, 385 F.2d 629, 635 (D.C. Cir. 1967):

> A regulatory agency may, should, and in some instances must, give consideration to objectives expressed by Congress in other legislation, assuming they can be related to the objectives of the statute administered by the agency.

II

The 1968 Relocation Amendments to the Federal-Aid Highway Act and Regulations Thereunder Grant Relocation Benefits to the Triangle Residents Which Have Not Yet Been Administratively or Judicially Accorded Them.

Petitioners have argued in I, *supra*, that reversal is required because the Triangle residents' rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated by the State's failure to provide an adequate relocation program, in which they would be free from private racial discrimination. But the Court need not reach this Constitutional question, since reversal is independently required by the 1968 Amendments to the Federal-Aid Highway Act and implementing regulations. While petitioners contend that the Federal Act and regulations clearly guarantee persons not yet displaced at the time of the Act's enactment an adequate relocation housing program, any ambiguity which may exist must be resolved by construing the Act and regulations so as to avoid the necessity for a constitutional adjudication.[65]

A. The 1968 Relocation Amendments Assure Persons Not Yet Displaced as of the Date of Enactment the Right to Adequate Replacement Housing, and Pursuant Thereto Mandate Detailed Relocation Plans.

The statutory language makes clear that the 1968 Relocation Amendments were intended to protect the rights of persons not yet displaced as of the time of enactment. Thus Congress did not, as it had in its first tentative

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[65] See, *e.g.*, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

measure dealing with highway dislocation,[66] limit the applicability of the requirements to projects not yet approved. The Act was declared effective and fully operative on the date of its enactment.[67] Moreover, the statute defines the term "displaced person," the very individual which it seeks to protect, as:

> any person who moves from real property on or after the effective date of this chapter [August 23, 1968] as a result of the acquisition or reasonable expectation of acquisition of such property [for a Federal-Aid highway].[68]

This interpretation is supported by the legislative history.[69] The 1968 Relocation Amendments arose out of recognition that the federal highway program had previously been wholly deficient in affording protection to persons displaced and had therefore resulted in widespread disruption and misery, particularly in urban areas and among the poor and minority groups. Further, at the time the 1968 Relocation Amendments were enacted, 32,000 of the 41,000 miles of the entire interstate road system had been constructed or were under construction. Of the 9,000

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[66] 23 U.S.C. §133(e), Br. App. 2.

[67] Pub. L. 90-495 §37, Aug. 23, 1968, 82 Stat. 831. The one limiting feature in the act provides that until July 1, 1970, it "shall be applicable to a state only to the extent that such state is able under its laws to comply . . ." *Ibid.*

It should be emphasized that it has never been suggested in these proceedings that West Virginia law in any way prevented the state from complying fully with the requirements of the 1968 amendments. See n. 25 *supra*. Moreover, the Department has determined that these limitations apply only to relocation payments and not to the requirements that adequate relocation housing be available. C.M. December 26, 1968, Br. App. 37-38.

[68] 23 U.S.C. §511(3).

[69] A summary of the relevant legislative history appears at Br. App. 47-52.

remaining miles, 8,500 were in the phases of engineering design and right of way approval, but construction and actual displacement had not taken place, since these phases typically occur years later.[69a] Thus the main dislocation problem facing Congress and with which it presumably attempted to deal was posed by the vast numbers of persons scheduled to be displaced under highway projects already approved. Finally, the committee reports and floor debate relating to the 1968 Amendments reflect Congress' recognition of the urgency of dislocation problems and of the need to act immediately to remedy them.[69b] Any interpretation making the Act's protections inapplicable to persons to be displaced by projects which had already been approved would defeat the obvious intent of Congress.

The protections afforded by the 1968 Amendments are detailed in Section 502, which provides specifically that the Secretary "shall not" approve any project "which will cause the displacement of any person . . . unless he receives satisfactory assurances from the State highway department" that:

> . . . within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment.[70]

[69a] 1968 U.S. Code Cong. & Adm. News. 3484.

[69b] See Br. App. 47-52.

[70] 23 U.S.C. §502(3); Br. App. 5.

This language clearly calls upon the Secretary to require the development by State officials of a program satisfactory to the Secretary which would guarantee relocation housing.[71]

In order to implement this provision, the Secretary of Transportation issued on September 5, 1968, a Memorandum entitled IM 80-1-68,[72] pursuant to his rule-making

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[71] The term "satisfactory assurances" in a closely related context appears first in section 305(a) of the Housing and Urban Development Act of 1965, Pub. L. 89-117, August 10, 1965, 79 Stat. 475; 42 U.S.C. §1455(c)(2) which mandates that as a condition of further assistance, "the Secretary [of Housing and Urban Development] shall require, within a reasonable time prior to actual displacement, satisfactory assurance by the local public agency" that satisfactory housing is available for all persons displaced. The House committee report on this section indicates that it was intended to "expand and implement the existing requirement that there be a feasible method for the temporary relocation" of urban renewal displacees. 1965 U.S. Code Cong. & Ad. News 2672; see also *id.* at 2645.

Cf. *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968) holding that the failure of the local agency to prepare and of the Secretary to review a relocation plan was a violation of the statute, and enjoining the proposed project until such a plan was submitted to the Secretary and approved by the court.

That Congress intended Section 502 to require the actual provision of relocation housing is also suggested by an amendment to the relocation provisions contained in the Federal-Aid Highway Act of 1970. Pub. L. 91-605 §117, Dec. 31, 1970, Br. App. 13-14. That section authorizes the Secretary to approve the cost of providing replacement housing for dislocatees where a highway project cannot proceed to construction "because replacement housing is not available and cannot otherwise be made available as *required* by section 502 of this title." (Emphasis added.)

[72] Br. App. 17-36.

Paragraph 2b(2) of the memorandum states that it is applicable to:

> All Federal-aid highway projects authorized on or before August 23, 1968, on which individuals, families, businesses, farm operations, and nonprofit organizations have not been displaced.

authority under the act.[73] Paragraph 7 of this memorandum specifically requires that the State highway department, "prior to proceeding with right-of-way negotiations *and/or* construction shall furnish" a relocation program plan for review and approval by the division engineer.[74]

The federal respondents suggested in their brief to the Court of Appeals that this language means that the requirements of the memorandum are applicable to previously authorized projects only if *no* persons had been displaced as of the effective date, and that since a small number of persons in the Triangle had moved before August 23, 1968, the requirements have no force here. Federal Appellees' brief at 21 N. 5. It is submitted that such an interpretation is not supported by the language, and is inconsistent with the legislative history of the 1968 Amendments, and with the statutory definition of a displaced person as "*any* person who moves from real property on or after the effective date of this chapter." This position is also in conflict with a circular memorandum issued February 12, 1969, which states that a relocation plan should be required on any project where a "substantial number of persons remain to be relocated." C.M. February 12, 1969, Br. App. 39-40.

[73] 23 U.S.C. §510; Br. App. 11.

[74] (Emphasis added.) Specifically, the State highway department is required to submit the following information for review and approval:

> (1) The methods and procedures by which the needs of every individual to be displaced will be evaluated and correlated with available . . . housing. . . .
>
> (2) The method and procedure by which the State will assure an inventory of currently available comparable housing available to persons *without regard to race, color*. . . .
>
> (3) An analysis relating to the characteristics of the inventories so as to develop a relocation plan which will:
>
> (a) outline the various relocation problems disclosed by the above survey;
>
> (b) provide an analysis of Federal, State and community programs affecting the availability of housing currently in operation in the project area;
>
> (c) provide detailed information on *concurrent displacement* and relocation by other governmental agencies or private concerns;
>
> (d) provide an analysis of the problems involved and the method of operation to resolve and relocate the relocatees . . . (Emphasis added.) IM 80-1-68 ¶7, Br. App. 26-27.

Having issued IM 80-1-68 in order to implement Section 502, the Department of Transportation was not free to disregard its requirements.[75]

However, despite Section 502 and IM 80-1-68, no relocation plan whatsoever with respect to any I-77 project was ever required or prepared prior to this lawsuit. Further, the plan—limited to Triangle—which was prepared in response to the suit failed to meet the minimal requirements of the statute and implementing regulation.[76]

The district court held that no relocation plan or other detailed factual demonstration of the availability of relocation housing for the Triangle displacees was required under the law because authorization to acquire right-of-way on the projects in the Triangle had been given in 1966 and 1967.[77] The court relied on ¶5b of IM 80-1-68, which pro-

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[75] While . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural requirements, neither was he prohibited from doing so . . . and having done so, he could not, so long as the Regulations remained unchanged, proceed without regard to them. *Service* v. *Dulles*, 354 U.S. 363, 388 (1957).

The desirability of requiring relocation plans had been recognized by the Department of Transportation even prior to Section 502's enactment. The study prepared by the Department in response to the congressional mandate contained a recommendation that state highway departments be required to submit relocation plans for all projects in large urban areas. *Highway Relocation Assistance Study*, 90th Cong., 1st Sess. at 16-17, 90 (1967). Moreover, in a memorandum to his regional and local subordinates issued January 23, 1968, seven months before the enactment of the statute, the Director of Public Roads urged that relocation plans be required in urban areas where large numbers of persons would be dislocated. Pl. Ex. No. 9; App. 79a-81a.

[76] Def. Ritchie Ex. No. 1; App. 99a-126a.

[77] Significantly the court did not address itself to the meaning of Section 508 which imposes an independent obligation on the State to assure the availability of adequate replacement housing.

vides that state relocation assurances, which include the ¶7 plan, "are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum."

Petitioners contend that this ruling constituted reversible error under the statute and existing regulations.

The sentence of ¶5b relied on by the district court is essentially meaningless as written since wherever authorization to commence construction has been given, authorization to acquire a right-of-way must also have been given. The sentence would make sense if the "or" were changed to "and" so that it read "authorization to acquire right-of-way *and* to commence construction." That this may well have been the intention is supported by the following sentence of ¶5b which provides that the state "will pick up the sequence at whatever point it may be in the acquisition program" on the issuing date of the regulations. This would appear to require that where, as here, the construction phase of the acquisition program had not received federal authorization as of the date of issuance of IM 80-1-68, the relocation requirements of ¶7 were to apply. This interpretation of ¶5b is supported by other sections of that same regulation which indicate that the relocation protections are applicable where construction or displacement has not yet occurred.[78] Moreover, the court's interpretation

[78] Thus the regulation is made applicable to all projects authorized on or before August 23, 1970, on which persons "have not been displaced" (¶2b(2)), and requires that relocation plans be prepared "prior to proceeding with right-of-way negotiations *and/or* construction" (¶7b). (Emphasis added.) The *construction* phase of the projects here in issue had *not* been given approval on effective date of the statute or the regulation. App. 132a-137a. By regulation, right-of-way *clearance* is a part of the construction stage. DOT policy and Procedure Memorandum 21-12. No clearance had taken place in the Triangle by the effective date of the statute or regulation, nor indeed at the time of the trial seven months later.

of ¶5b conflicts with memoranda issued after IM 80-1-68 but before this trial which indicate the Department's recognition of its obligation under Section 502 and IM 80-1-68 to require relocation plans for persons not yet displaced regardless of when right-of-way acquisition or construction was approved.[79]

But even assuming that ¶5b was intended to permit the displacement of persons after the effective date of the 1968 Amendments without adequate relocation guarantees, as the District Court found, then it was in clear conflict with the statutory purpose and should have been declared null and void.

In upholding the restrictive interpretation of the statute contained in ¶5b, the District Court relied on *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965): "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or

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[79] A Circular Memorandum to regional DOT officials issued by the Bureau of Public Roads on December 26, 1968, provides:

> Under paragraph 7b(3) [of IM 80-1-68] the division engineer should insist that the State furnish an analysis of the relocation problems and possible solutions in *sufficient detail to enable him to determine the advisability of proceeding with the project* and to assure that no relocatee will be required to move unless there is satisfactory replacement housing available to him. CM, December 26, 1968; Br. App. 37-38 (Pl. Ex. No. 3) (Emphasis added).

A similar memorandum issued February 12, 1969, states that while all ¶7 assurances may not be called for where a "major portion of the relocations have previously been accomplished," the submission of the data required by ¶7b would be appropriate "if a substantial number of persons remain to be relocated," even on going projects. CM, February 12, 1969, Br. App. 39-40 (Pl. Ex. No. 3). The Federal highway officials in West Virginia failed to require the state to supply any additional information in compliance with these instructions from their superiors.

agency charged with its administration." [80] However, as was stated more recently in *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969), the "departmental construction of its own enabling legislation . . . is only one input in the interpretational equation," whose weight is limited when the agency construction was not known to Congress when the statute was considered, and which should be disregarded where it conflicts with Congressional intent.[81]

Whether or not the district court erred in ruling at the time of trial that the Department had no obligation to require and review a relocation plan with respect to persons not yet displaced on the effective date of the 1968 Amendments, there can be no question that regulations issued by the Department in April, 1970 while this case was pending on appeal, required reversal under *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969). These regulations specified that construction (defined to include clearance) should not be authorized until persons who would be displaced by it had been provided with adequate replacement housing.[82] While these regulations are inadequate in that they provide no relief for persons displaced prior to

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[80] App. 53a, 314 F. Supp. at 29.

[81] Accord, *Cy Ellis Raw Bar* v. *District of Columbia Redevelopment Land Agency*, 433 F.2d 543, 548, 550 (D.C. Cir. 1970).

[82] The first is a memorandum from the Secretary to his subordinates ordering that their policies require that construction be authorized "only upon verification that replacement housing is in place and has been made available to all affected persons." Br. App. 41-42. The second is a memorandum from the Right-of-Way Director of the Bureau of Public Roads to the Regional Administrators. Applicable to all projects authorized after May 1, 1970, and to all authorized before that date "on which individuals and families are still to be displaced," it provides:

> The division engineer shall not authorize any phase of construction (clearance of right-of-way regardless of how performed is considered to be a construction phase insofar as this memorandum is concerned) which would require the displacement of individuals or families, or permit the dislocation of

1970 in violation of Section 502's requirements, they at least make clear that comprehensive relocation plans were required before construction approval as the entire Court of Appeals apparently recognized.[83] The failure of the Court of Appeals to reverse on the basis of the intervening regulations was apparently grounded on the assumption that the Department's new policy would be applied to the Triangle and that petitioners' claims were thus mooted.[84] But as Judge Sobeloff points out in his dissent from the denial of rehearing *en banc*, this assumption was unwarranted since defendants had continued on the appeal to press their contention that no formal relocation plan was required despite the new regulations. And as Judge Sobeloff also noted, failure to reverse the district court's decision might well be interpreted as approval of that court's holding that no duty existed to provide an adequate relocation housing program (App. 78a; 429 F.2d at 426).

Indeed, the defendants have prepared no relocation plan, and to this date have resisted the requirement for an analysis (in accordance with the guidelines of the regulations) that would definitely test, either to corroborate or to contradict, their assertion that adequate housing exists.

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individuals or families on any such project or on any project already authorized, until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the State offers him adequate replacement housing which is available for immediate occupancy. C.M. March 27, 1970, as amended, April 10, 1970, Br. App. 43-44.

[83] There is, of course, no dispute within the court that the appellants' [petitioners here] position on the applicability of the 1968 amendments has now become the law and that comprehensive relocation plans are required before construction can be approved.

App. 77a, 429 F.2d at 426. (Sobeloff, J., dissenting).

[84] See Judge Sobeloff's dissent from the denial of rehearing *en banc*, App. 77a-78a; 329 F.2d at 426.

While the April, 1970 regulations require reversal of the district court's ruling, reversal on this ground alone would be insufficient. First, as noted, the new regulations fail to provide any remedy for persons displaced prior to their issuance and, further, they do not specify the detailed requirements of an adequate relocation plan as does IM 80-1-68. Second, as was recently argued before this Court in another pending case,[85] and as the record in this case makes manifest, the Department of Transportation has shown little regard for its own policy statements as limits upon or guides to its actions.[86]

Similarly, no change has taken place while the case has been pending in this Court which obviates the need to decide whether the 1968 Amendments apply to protect the rights of persons not yet displaced at the time of those amendments, and whether they require a comprehensive relocation plan together with guarantees of actual relocation housing.[87]

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[85] *Citizens to Preserve Overton Park* v. *Volpe*, O.T. 1970, No. 1066, Brief for Petitioners at 21 n. 16.

[86] The insignificance accorded to such policy statements is indicated by a recent amendment to the Department's Regulations providing that:

> "No such direction, policy, rule, procedure, or interpretation contained in a Federal Highway Administration order or memorandum shall be considered a regulation or create any right or privilege not specifically stated therein." 35 Fed. Reg. 6322 (1970) amending 23 C.F.R., Chap. 1, pt. 1 §132.

[87] On October 30, 1970, IM 80-2-70 was issued by the Federal Highway Administrator. It supercedes IM 80-1-68, supplying detailed relocation regulations. It is not effective until 90 days after issuance, and is inapplicable to projects on which construction has been previously authorized and persons previously displaced.

A November 6, 1970 memorandum from the Under Secretary of Transportation (Br. App. 45-46) indicated that:

> Further construction involving the Triangle Area will be authorized only after the people now living within the right-of-way in that area have been relocated into adequate decent,

B. In the Absence of Compliance with the Requirements of the 1968 Relocation Amendments, Administrative Action by State and Federal Officials Cannot Be Upheld on the Basis of General Assurances That Efforts Are Being and Will Be Made to Relocate Persons Displaced, and That Adequate Relocation Housing Exists.

The district court found that the major requirements of the 1968 amendments and the implementing IM 80-1-68 were not intended to apply to persons not yet displaced as of their effective date where authority to acquire right-of-way had previously been given. To the limited extent the court did consider the statute applicable, it relied on assurances made at the trial by state and federal officials that appropriate efforts were being made to comply with the provisions of the 1968 Act "in a practical if not a formal manner, even though such compliance is not legally required" (App. 55a), and to deal with persons residing in the Triangle "in a manner that comports with the federal statutes and regulations" (App. 56a). The court further found that "adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees . . ." (App. 57a).

Petitioners submit that if, as argued *supra*, the applicable law and regulations required the submission of comprehensive relocation plans to federal authorities for their review and approval, then agency action which disregarded those specifically mandated procedures cannot be upheld on the basis of mere assurances that the rights of displaced

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safe and sanitary housing, in accordance with DOT Order 5620.1.

While the memoranda constitute additional evidence of the Department's recognition that Section 502 does in fact require a comprehensive relocation plan together with actual provision of adequate relocation housing, they do not moot the issues in this case for the same reasons that the April 1970 regulations do not.

persons would be protected or on the basis of evidence which the court considered *de novo* with respect to the availability of relocation housing. Further, petitioners submit that the court's purported finding that adequate replacement housing would be available is clearly erroneous.

1. *Reversal Is Required Because the Procedures Mandated by Law with Respect to the Submission for Review and Approval of a Comprehensive Relocation Plan Were Not Followed.*

As noted *supra*, no relocation plan comporting with the requirements of the 1968 amendments and IM 80-1-68 was ever prepared. Instead, the Department of Transportation relied on conclusory, general assurances[88] that the State Road Commission would adequately rehouse persons displaced by all its projects across the State.[89] The partial relocation plan submitted subsequently by the State Road Commission,[90] concededly inadequate under the standards

[88] The position taken by the Department of Transportation throughout this litigation, and apparently approved by the district court, has suggested that Section 502's requirement of "satisfactory assurances" is so open-ended and undefined that mere verbal or even unarticulated assurances are sufficient. This Court should not readily infer that Congress gave the agency essentially standardless and thus unconstitutional discretion. *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958).

[89] The State Road Commission's assurances, dated November 13, 1968, stated:

> "The State Road Commission does provide timely, orderly and efficient relocation of displaced individuals and families to decent, safe and santiary housing with minimum hardship to those affected, to the extent such housing is reasonably available. . . .
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> "The State Road Commission is making a sincere and realistic effort to comply with the provisions of this Instructional Memorandum to the extent it can reasonably be done on previously authorized projects, and will continue such efforts on projects authorized in the future . . ." (Pl. Ex. No. 5).

[90] App. 386a. See Def. Ritchie Ex. No. 1, App. 99a-126a.

of the IM, and prepared solely for this litigation, was not even reviewed by the Department as required by law.[91]

There are three general considerations which make careful judicial review of administration action in this particular situation essential. The first is that the agency involved has, itself, helped to create the harm which Congress has now directed it to correct. In the past, agencies have ordinarily been set up to administer remedial legislation regulating other parties' activities in the public interest. The agency here, however, is not the "Department of Relocation" (nor is there even an individual charged with the sole responsibility of relocation). The Department of Transportation's primary function is that of a road builder: to build the interstate system, and to build it fast. In the process, it has displaced thousands upon thousands of people who have not been adequately rehoused. Now Congress has said: reform yourself. Under these circumstances, the Department's procedures and decisions regarding relocation should be closely scrutinized.

A second factor calling for careful judicial review is that there are no internal agency review procedures available. Neither federal nor state highway agencies have established procedures of receiving, investigating or resolving relocation complaints. At trial, a Department of Transportation official testified that the only means of appeal that

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[91] App. 209a, 407a-408a. The Department also relied on the impressions of its right of way officer who relied on the same general, conclusory assurances by the State and its "half of a relocation plan" (App. 168a). He also relied on his experience in supervising the administration of the inadequate relocation programs under the 1962 relocation amendments, and studies he had undertaken in February and March, 1968 (App. 175a-180a). He conveniently ignored his February and March, 1968, studies which pointed out serious deficiencies in the availability of relocation housing (App. 84a-98a; Pl. Ex. No. 12. See *supra* 7-9).

he could recommend to an aggrieved person was writing to his Congressman or the President.[92]

A third compelling reason for the careful scrutiny of agency action in this case is that the Triangle residents have been faced with the bewildering complexities of dealing with two separate agencies, which has compounded the ordinary problems characterizing agency proceedings.[93] Moreover, throughout these proceedings, particularly in the district court, the plaintiffs have encountered "the pervasive impatience—if not hostility" of the agencies.[94]

While the district court acknowledged that the actions of governmental highway agencies are judicially reviewable;[95] the court so restricted its review as to render it virtually meaningless.

Thus, rather than looking to the factual record on which the administrative officials based their determinations, the court relied, in sustaining those determinations, on oral assurances, given to the court during the trial; on the basis of which it concluded that federal and state authorities were making a "sincere" effort, and that defendants' "assurances" that they would comply with the law were given "in good faith." [96]

While these obviously inadequate oral assurances appear to have been the basis for the court's decision, the opinion

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[92] App. 227a.

[93] See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1253 (1965), noting that agency proceedings are characterized by "closed doors, Kafka-like uncertainty, difficulty in locating responsibility, and rigid adherence to a particular point of view."

[94] See *Office of Communication of United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969) where agency hostility was held to be a factor requiring rejection of its determination.

[95] App. 46a-48a; 314 F. Supp. at 26-27.

[96] App. 56a; 314 F. Supp. at 30.

also implies that the federal officials' actions were in "substantial compliance" with federal laws and regulations (App. 56a; 314 F. Supp. at 30) and were "premised on rational grounds" (App. 55a; 314 F. Supp. at 30). Even assuming that the opinion was in any sense grounded on such findings, and that they were supported by the record, it is clear that the standards of judicial review implied are wholly inadequate. In *Charlton* v. *United States*, 412 F.2d 390 (3d Cir. 1969), the court rejected the contention that an agency's "substantial compliance" with its statute and regulations satisfied the requirements of the Administrative Procedure Act,[97] and held that agency action had to be supported by substantial evidence. The substantial evidence test has been found applicable to administrative decisions regarding relocation.[98] While the evidentiary record in a case like this differs from the kind of record developed by federal agencies with formal hearing mechanisms, there is still an administrative record that a court can and should review. In a recent decision involving review of route location decisions by the Department of Transportation, a district court defined the administrative record to include all "the information which the Administrator had before him," and held: "It is on that record that the Administrator acted and on that record that his action must be judged." *Road Review League* v. *Boyd*, 270 F. Supp. 650, 662 (S.D. N.Y. 1967). Such a requirement

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[97] The district court properly noted the applicability of the Administrative Procedure Act. App. 47a-48a; 314 F. Supp. 26-27.

[98] See, *e.g.*, *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433, 443 (N.D. Cal. 1968) (involving the urban renewal relocation statute); Note, *The Federal Courts and Urban Renewal*, 69 COLUM. L. REV. 472 (1969). Moreover the substantial evidence test set forth in *Charlton* v. *United States*, *supra*, has been followed in recent cases. *DeLong* v. *Hampton*, 422 F.2d 21 (3d Cir. 1970); *Pauley* v. *United States*, 419 F.2d 1061 (7th Cir. 1969) (Arbitrary and capricious test also applied.)

compels a rational decision-making process by the agency, rather than allowing it to rely upon belatedly contrived rationalizations for its action (such as the Triangle "relocation plan").

The district court erred by not reviewing the record in this case to determine whether the agency followed procedures required by law, and whether the agency's determinations were supported by substantial evidence, or were instead arbitrary and unlawful.

The Department of Transportation recognized in promulgating IM 80-1-68 that it is vital to the protection of persons to be displaced that there be an adequate mechanism for gathering information regarding relocation. Further, the agency specified in the regulations the kind of information essential to a determination of the adequacy of relocation housing so that the Department might have a basis for determining whether state assurances were satisfactory.

It is fundamental that once having prescribed the procedure through which it is to reach its determination, an agency is not free capriciously to reject that procedure.[99] Thus the federal defendants could not lawfully accept the state highway commission's relocation assurances without making a "review and approval" of the required factual "survey" and "analysis" prepared by the State. IM 80-1-68, ¶7.

Further, on the administrative record presented here the Department of Transportation's conclusion that adequate protection was being accorded to persons displaced in the Triangle cannot be sustained. It is essential that an administrative agency base its actions on adequate inquiry into

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[99] *Service* v. *Dulles*, 354 U.S. 363 (1957). Cf. *D.C. Federation of Civic Associations, Inc.* v. *Airis*, 391 F.2d 478 (D.C. Cir. 1968); *Moss* v. *C.A.B.*, 430 F.2d 891, 901 (D.C. Cir. 1970).

and consideration of the relevant facts,[100] and that an adequate record of the grounds for administrative action be made and disclosed so that judicial review is possible.[101]

In the instant case there was virtually no factual investigation or analysis by the administrative agencies involved of the relocation problems posed by the Triangle projects as there would have been if a proper relocation plan had been prepared and reviewed. The analyses prepared by the Department of Transportation of relocation housing problems in Charleston all preceded the enactment of the 1968 relocation amendments.[102] The State's relocation plan ignored vital considerations such as race and competing displacement, was inadequate under the regulations, and was never reviewed by federal officials. This administrative record regarding the existence, in fact, of sufficient adequate housing consists solely of bald, unsubstantiated "assurances" by the State.[103] Neither the written assurances nor

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[100] See, *e.g.*, *Scenic Hudson Preservation Conference* v. *Federal Power Comm.*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Shannon* v. *Department of Housing and Urban Development*, —— F.2d —— (3d Cir., Dec. 30, 1970, No. 18,397); *Office of Communications of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966); see also, 425 F.2d 543, 548 (D.C. Cir. 1969); *Michigan Consolidated Gas Co.* v. *Federal Power Comm.*, 283 F.2d 204, 226 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 913 (1960).

[101] See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). See also *Thorpe* v. *Housing Authority*, 393 U.S. 268, 283 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

[102] App. 84a-98a.

[103] See Pl. Ex. No. 5, letter dated November 13, 1968, from M. R. Hamill, then State Road Commission of West Virginia to the Bureau of Public Roads:

> The State Road Commission assures the Bureau of Public Roads that the provisions of paragraph 5(a) will be complied with on all Federal-Aid projects. . . .
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> • • • •
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> The State Road Commission does provide timely, orderly and efficient relocation of displaced individuals. . . .

the oral assurances given at trial reveal any numerical factual underpinning. The Department accepted the State's assurances without providing any reasons or analysis.[104] The two federal officials who testified to the assurances of the State conceded that they had relied on assumed expertise and past experience,[105] despite the fact that this experience had occurred prior to the 1968 amendments when virtually no significant relocation requirements existed.

In short, the administrative record contains no complete and detailed relocation assurances submitted by the State. Under these circumstances, the federal officials' conclusions that the State could, in fact, provide the adequate relocation housing required by law should not have been sustained by the district court.[106]

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[104] Pl. Ex. No. 7, letter from Bureau of Public Roads to M. R. Hamill, dated November 20, 1968.

[105] App. 176a-177a.

[106] In *Scenic Hudson Preservation Conference* v. *FPC*, *supra* n. 100, the court remanded the case to the agency because of the agency's failure to compile a *sufficient* record. In *Shannon* v. *HUD*, *supra* n. 100, the court held that the agency's decision "must be an informed one" (slip op. p. 23), and that "the agency must utilize some institutionalized method" whereby it has before it the relevant information (slip op. pp. 20-21). Similarly, in *Office of Communications of the United Church of Christ* v. *FCC*, *supra* n. 94, the court held that an administrative agency has "an affirmative duty to assist in the development of a meaningful record which can serve as the basis for the evaluation" of the performance of the party in question. 425 F.2d at 548.

For cases in which courts have remanded to agencies for the reason that the grounds for the administrative decision did not clearly appear on the record, see *e.g.*, *Medical Committee for Human Rights* v. *Securities and Exchange Commission*, 432 F.2d 659, 676 (D.C. Cir. 1970); *Environmental Defense Fund* v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); see also *Williams* v. *Robinson*, 432 F.2d 637, 641 (D.C. Cir. 1970); *Environmental Defense Fund* v. *Ruckelshaus*, —— F.2d —— (D.C. Cir., Jan. 7, 1971, No. 23813) (slip op. pp. 22, 23).

The district court also erred in ruling that the agency action could be sustained on the basis of the court's *de novo* consideration of evidence with respect to the availability of relocation housing and purported finding that "adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees." [107] In making this factual finding, the district court usurped the function of the agency. If the notion of agency expertise is to have any meaning, it is clear that the agency must make the initial factual determination. This is particularly important in the present case where newly enacted programs are concerned, since the agency should in the first instance have an opportunity to develop reasonable procedures to enforce the new law, and should be allowed to develop the appropriate expertise.

2. *The District Court's Purported Finding That Relocation Housing Was Adequate Was Clearly Erroneous.*

In the first place the district court's determination that relocation housing was adequate was apparently made without reference to the standards mandated by Section 502 and IM 80-1-68, since the court took the position that they were inapplicable. Thus the court based its finding on only a few limited factors, ignoring many of the elements which ¶7 of IM 80-1-68 provides must be considered, such as the type and quality of available housing, its proximity to transportation and employment, the effect of concurrent displacement, and the detailed standards as to what con-

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[107] App. 57a, 314 F. Supp. at 31. That the court undertook to make this determination is particularly surprising in light of its statement that "courts should not undertake the administration of complex and far reaching federal programs, but upon appropriate judicial review should determine only whether the agency administering the program is in substantial compliance with the applicable statutes and regulations." App. 55a-56a, 314 F. Supp. at 30.

stitutes "decent, safe and sanitary" housing. Indeed, the record does not even contain the information necessary to make a proper determination under the applicable law and regulations, since the respondents failed to provide it and the district court ruled that they were not required to do so.[108]

Even apart from the legal standard applied, the record does not support the court's finding that adequate relocation housing was available, on a nonracial basis. This finding was based on the court's conclusion that:

> Even should no housing be available for dislocateees in the private housing market, the evidence clearly demonstrates that there is ample public housing in the Charleston area to accommodate the limited number of individuals remaining in the I-77 corridor in the Triangle area.[109]

In reaching this conclusion, the court relied heavily on the "Triangle Relocation Plan" prepared by the state defendant for this lawsuit.[110] This plan asserted that the majority of the Triangle residents "appear" to be eligible for public housing. The plan also reasoned that since there was a *turnover* of approximately 30% of the city's public housing units, and since highway displacees have preferted access to public housing, there would be available over the span of time in which the relocation from the Triangle

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[108] The record's inadequacy was further exacerbated by the court's denial of all discovery to the plaintiffs. App. 38a-39a, 314 F. Supp. at 22-23. *Cf. Citizens to Preserve Overton Park* v. *Volpe*, 432 F.2d 1307, 1316, n. 1. (6th Cir. 1970) (Celebrezze, J., dissenting), *cert. granted* December 7, 1970, O.T. 1970, No. 1066; *Office of Communications of the United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969).

[109] App. 57a, 314 F. Supp. at 31.

[110] Def. Ritchie Ex. No. 1, App. 99a-126a.

would take place, approximately 319 units—more than the number of families to be displaced in the Triangle.

This analysis fails first in that it takes no account of concurrent displacement, a factor considered of great importance in the regulations. That is, the plan considers the Triangle in isolation. But, as the court found, the Triangle displacees constituted only one-third of those to be displaced by the two projects entering the district, as of the time of trial, and less than one-seventh of the total who either had been or were to be displaced.[111] And even these figures do not take into account displacement by other highway projects outside the Triangle involved in the Interstate system in Charleston, or by other public programs. There was no evidence whatever of the number of such displacees who would be eligible for public housing and thus compete with the Triangle displacees.

Secondly, the record contains no income statistics or other evidence showing that the Triangle residents were in fact eligible for public housing. The state plan's assumption of eligibility relied solely on the fact that the average *rents* in the area were one-half those in the city as a whole.

Finally, in contrast to the reported *turnover* rate of 30%, the record shows a *vacancy* rate in public housing of about 1%[112] and a city-wide vacancy rate of 2.7%.[113] These figures indicate that adequate relocation housing was not

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[111] App. 45a-46a, 314 F. Supp. at 26.

[112] The Executive Director of the Housing Authority testified that at any time an average of eleven of the total 934 units were vacant. App. 245a. He also testified that there was a waiting list of 600 families who had been found eligible for public housing, and that on the average a person without priority would wait 18 to 24 months to be admitted. App. 246a-247a.

[113] App. 299a.

available in Charleston, since it is the vacancy rate which is relevant in determining the number of excess units available for relocation housing, and since a vacancy rate of less than 3% has been found by authorities experienced in these problems to be inadequate for relocation planning.[114] The district court's finding that there was adequate public housing[115] available to the dislocatees is, therefore, clearly erroneous.

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[114] The relocation guidelines of the Department of Housing and Urban Development, which administers the federal programs causing the greatest amount of displacement provide:

> Turnover, in essence, represents the process by which one occupied unit becomes vacant and reoccupied. It is a "neutral" process with respect to altering the supply of excess housing, i.e., the number of units which are in excess of the combined amount required to accommodate locality households and provide for mobility. It is only the excess units—or vacancies—which can be considered as supplying relocation housing resources for displaced families.
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> . . . .
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> 1. For determination of number of existing, standard vacant units available for relocation:
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> *Policy:* Only that amount of standard vacant rental housing which is in excess of a 3 percent renter vacancy rate shall be counted in the relocation planning. Furthermore, only those units in excess of the 3 percent vacancy rate which are appropriate by unit size (i.e., 1 bedroom, 2 bedroom, 3 bedroom, etc.) and which are appropriate by rent ranges required by the displaced households shall be counted as resources. (Department of Housing and Urban Development, Regional Circular No. 907, *Relocation Resources and Criteria*, February 26, 1968.)

These guidelines were presented to the district court. App. 299a.

[115] Although the district court proceeded on the assumption that no housing would be available to the Triangle displacees in the private housing market (App. 57a; 314 F. Supp. at 31), the federal respondents seek to bolster the court's ruling by reference to evidence of the availability of such private housing (Brief for the Federal Respondents in Opposition to Certiorari, at 5-7). Evidence with respect to availability of *private* housing, not relied on by the court, clearly cannot be used to sustain the court's factual conclusions with respect to *public* housing. And, in any event, the evidence relied on by respondents does not support a conclusion

III

The Questions of Retroactive Application and Appropriate Remedy.

Petitioners' position throughout this litigation has been that the highway officials have failed to meet their obligations under the 1968 Highway Act by failing to insure that adequate housing was available for the Triangle displacees. They have urged that the respondents should meet this obligation by the method proposed in their own regulations, that of preparing a thorough relocation plan which would analyze fully the needs of the persons to be dis-

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that adequate housing was available in the private market. The fact that the state had relocated about 2000 persons in the previous two years necessarily removed available housing from the supply without replacing it. Experience with prior relocation cases was under the prior statute which did not even require replacement housing, much less set standards for it. Finally, the evidence indicated that the only significant change since the time of the federal studies which warned of a possibly "critical" shortage of housing in Charleston (Pl. Ex. No. 12, App. 84a-98a) was the availability of rent supplements available under the new act (App. 425a-428a). Rent supplements provide no relief for families who are living in apartments beyond their means when the two year payments expire (App. 428a). The present Secretary of Transportation has himself noted in a related context that the very fact that rent supplements are needed is proof that available housing is insufficient:

> [O]ne of the basic protections of the bill is that displacement is not to take place unless there is advance assurance that adequate housing, at prices they can afford, will be available to these families. Payment of a RAP (relocation adjustment payment or rent supplement) indicates that this requirement is not being met. Second, the adjustment payment only defers the hardship for two years. At the end of that period, the payment ceases, and the household is left in housing which is beyond its means.

Statement of Governor John A. Volpe, *Hearings Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations*, 90th Cong., 2nd Sess. at 481 (1968).

located, and the housing available to supply these needs, so that it could be demonstrated in a documented and reviewable manner whether the requirements of the statute were being met. If the Court accepts this view, it is necessary to consider what remedy is now appropriate to correct the wrongs which have been committed.

Congress intended that every person displaced by federal highway programs since August 23, 1968 be assured the availability of satisfactory replacement housing. The failure of the administrators to fulfill this obligation, combined with their zeal to complete the highway and the realities of the inadequate supply of housing in Charleston has resulted in the displacement of a major portion of those on the right-of-way in the Triangle,[116] many into demonstrably inadequate housing. Moreover, the State Road Commission has failed in several respects to meet even the minimal assurances it made at the trial. For those who remain to displaced, the preparation of a relocation plan, which meets the requirements of the regulations,[117] and which would be reviewed by the district court may be appropriate relief.

For those who have moved, it is submitted that they should not be put in the position of being told that although they were denied the rights which Congress intended them to have, they are yet to be compelled because of administrative wrongdoing to remain in inadequate housing. A remedy is now available to deal with this problem. In the Federal-Aid Highway Act of 1970, enacted Decem-

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[116] At the time of trial there were 284 persons to be displaced in the Triangle. App. 46a. Petitioners' most recent survey, taken December 23, 1970, shows that 65 persons and 14 businesses remain. The State respondents assert that 35 persons and 5 businesses remained on January 28, 1970.

[117] The more detailed requirements of I.M. 80-2-70 may be applicable to a plan now formulated. See *supra* at n. 87.

ber 31, 1970,[118] Congress authorized the Secretary to approve as "a part of the cost of construction" of Federal-aid highways the cost of building new housing and purchasing, rehabilitating or moving existing housing as replacement housing for dislocatees where a project cannot proceed because of a lack of available housing "as required by section 502" of Title 23. This statute provides a readily available method to deal with the housing needs of highway dislocatees in Charleston. On remand, the respondents should be required to locate all those who have been displaced from the Triangle and to present to the court a report of their present housing condition. Where they are now in satisfactory and acceptable housing, nothing more need be done. Where, however, they have been forced into inadequate or substandard housing, the respondents should be compelled to use the provision of the 1970 Highway Act authorizing the construction, rehabilitation or purchase of housing for dislocatees to provide them with "decent, safe and sanitary housing."[119]

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[118] Pub. L. 9-605, §117; Br. App. 13-14. As already mentioned, *supra* n. 71, petitioners suggest that this new provision demonstrates that Congress did indeed intend the 1968 act to *require* the provision of replacement housing for dislocatees.

[119] This suggestion is in accord with the relief granted in *Shannon v. Department of Housing and Urban Development*, —— F.2d ——, (3d Cir., Dec. 30, 1970, No. 18,397). There the Court ruled that a low rent housing project had been authorized and financed by HUD without regard for its obligation to promote fair housing and in fact in a manner which promoted racial separation. By the time the appeals court ruled, the building was completed and occupied. The court held that relief was nonetheless required, and that the case was not moot. It suggests as possible remedies on remand the withdrawal of further HUD support, the possible replacement of rent supplement tenants with market rental tenants, or the sale of the project to a profit-making owner. Slip Op. at 23-24.

As DOT regulations permit the free amendment of projects already approved to take into consideration changed conditions, PPM 21-7, there should be no technical difficulty in applying this remedy to the on-going projects. Cf. I.M. 80-1-68, ¶4b, Br. App. 19-20.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded to the district court with instructions that further displacement be enjoined until the respondents have prepared a relocation plan in accordance with the regulations for all remaining displacees, and that those already displaced in violation of the law be afforded the remedy suggested in Point III.

Respectfully submitted,

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APPENDIX A

Statutes

1962 RELOCATION AMENDMENT

(23 U.S.C. §133)

(Pub. L. 87-866, §5(a), Oct. 23, 1962, 76 Stat. 1146)

(Repealed effective July 1, 1970; See Pub. L. 90-495, §37, Aug. 23, 1968, 82 Stat. 836, and Pub. L. 91-605, §120, Dec. 31, 1970.)

§133. Relocation assistance

(a) As used in this section the term "eligible person" means any individual, family, business concern (including the operation of a farm) and nonprofit organization to be displaced by construction of a project.

(b) The Secretary prior to his approval of any project under section 106 of this title for right-of-way acquisition or actual construction shall require the State highway department to give satisfactory assurance that relocation advisory assistance shall be provided for the relocation of families displaced by acquisition or clearance of rights-of-way for any Federal-aid highway.

(c) The Secretary shall approve, as part of the cost of construction of a project on any of the Federal-aid highway systems, such relocation payments as may be made by a State highway department, or a local public agency acting as an agent for the State highway department for this purpose, to eligible persons for their reasonable and necessary moving expenses caused by their displacement from real property acquired for such project. However, the Sec-

retary shall not require a State to pay relocation payments where not authorized by State law.

(d) Payments under this section shall be subject to such rules and regulations as may be prescribed by the Secretary, and shall not exceed $200 in the case of an individual or family, or $3,000 in the case of a business concern (including the operation of a farm) or nonprofit organization. In the case of a business (including the operation of a farm) and in the case of a nonprofit organization, the allowable expenses for transportation under this subsection shall not exceed the cost of moving 50 miles from the point from which such business or organization is being displaced. Such rules and regulations may include provisions authorizing reimbursement for payments made to individuals and families of fixed amounts (not to exceed $200 in any case) in lieu of their respective reasonable and necessary moving expenses.

(e) This section shall apply only with respect to projects approved under section 106 of this title after the date of enactment of this section.

RELOCATION ASSISTANCE STUDY: REPORT TO CONGRESS BY JULY 1, 1967

(Pub. L. 89-574, §12, Sept. 13, 1966, 80 Stat. 770)

(a) The Secretary of Commerce is authorized and directed to make, in cooperation with the Secretary of the Department of Housing and Urban Development, the State highway departments, and other affected Federal and State agencies, a full and complete study and investigation for the purpose of determining what action can and should be

taken to provide additional assistance for the relocation and reestablishment of persons, business concerns, and nonprofit organizations to be displaced by construction of projects on any of the Federal-aid highway systems, and to submit a report of the findings of such study and investigation, together with recommendations, to the Congress not later than July 1, 1967. The study and investigation shall include, but shall not be limited to—

(1) the need for additional payments or other financial assistance to such displaced persons, business concerns, and nonprofit organizations, and the extent to which the making of such payments and the providing of other financial assistance should be mandatory;

(2) the feasibility of constructing, within the right-of-way of a highway or upon real property adjacent thereto acquired for such purposes, publicly or privately owned, buildings, improvements, or other facilities to aid in the relocation of such displaced persons, business concerns, and nonprofit organizations;

(3) the extent to which the costs of acquiring such real property and constructing such buildings, improvements and other facilities should be paid from the highway trust fund; and

(4) sources of funds to pay the portion of the costs of acquiring such real property and constructing such buildings, improvements and other facilities, which is not properly chargeable to the highway trust fund.

Appendix A

1968 HIGHWAY RELOCATION AMENDMENTS

(23 U.S.C. §501 *et seq.*)

(Pub. L. 90-495, §30, Aug. 23, 1968, 82 Stat. 830)

§501. Declaration of policy

Congress hereby declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced as a result of the Federal highway programs and the construction of Federal-aid highways is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. Therefore, Congress determines that relocation payments and advisory assistance should be provided to all persons so displaced in accordance with the provisions of this title.

§502. Assurances of adequate relocation assistance program

The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any persons, business, or farm operation unless he receives satisfactory assurances from the State highway department that—

(1) fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506, and 507 of this title;

(2) relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons; and

(3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment.

§503. Administration of relocation assistance program

In order to prevent unnecessary expenses and duplication of functions, a State highway department may make relocation payments or provide relocation assistance or otherwise carry out the functions required under this chapter by utilizing the facilities, personnel, and services of any other Federal, State, or local governmental agency having an established organization for conducting relocation assistance programs.

§504. Federal reimbursement

(a) The Secretary shall approve, as a part of the cost of construction of a project under any Federal-aid highway program which he administers, the cost of providing the payments and services described in section 502, except that notwithstanding any other law, the Federal share of the first $25,000 of such payments to any person, on account of any real property acquisition or displacement occurring prior to July 1, 1970, shall be increased to 100 per centum of such cost.

(b) Any project agreement with a State highway department executed before the date of enactment of this chapter with respect to property which has not been acquired as of the date of enactment of this chapter under any such program shall be amended to include the cost of providing the payments and services described in section 502 with respect to such property.

§505. Relocation payments

(a) Payments for actual expenses. Upon application approved by the State agency, a person displaced by any highway project approved under section 106 or section 117 of this title may elect to receive actual reasonable expenses in moving himself, his family, his business, or his farm operation, including personal property.

(b) Optional payments—dwellings. Any displaced person who moves from a dwelling who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (a) of this section may receive—

(1) a moving expense allowance, determined according to a schedule established by the Secretary, not to exceed $200; and

(2) a dislocation allowance of $100.

(c) Optional payments—businesses and farm operations. —Any displaced person who moves or discontinues his business or farm operation who elects to accept the payment authorized by this section in lieu of the payment authorized by subsection (a) of this section, may receive a fixed relocation payment in an amount equal to the average

annual net earnings of the business or farm operation, or $5,000, whichever is the lesser. In the case of a business, no payment shall be made under this subsection unless the State agency is satisfied that the business (1) cannot be relocated without a substantial loss of its existing patronage, and (2) is not part of a commercial enterprise having at least one other establishment, not being acquired by the State or by the United States, which is engaged in the same or similar business. For purposes of this subsection, the term "average annual net earnings" means one half of any net earnings of the business or farm operation, before Federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such two year period.
Added Pub. L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 831.

§506. Replacement housing

(a). In addition to amounts otherwise authorized by this title, the State agency shall make a payment to the owner of real property acquired for a project which is improved by a single-, two-, or three-family dwelling actually owned and occupied by the owner for not less than one year prior to the initiation of negotiations for the acquisition of such property. Such payment, not to exceed $5,000, shall be the amount, if any, which, when added to the acquisition payment, equals the average price required for a comparable dwelling determined, in accordance with standards established by the Secretary, to be a decent, safe, and sanitary dwelling adequate to accommodate the displaced owner, reasonably accessible to public services and places of em-

ployment and available on the private market. Such payment shall be made only to a displaced owner who purchases and occupies a dwelling within one year subsequent to the date on which he is required to move from the dwelling acquired for the project. No such payment shall be required or included as a project cost under section 504 of this title if the owner-occupant receives a payment required by the State law of eminent domain which is determined by the Secretary to have substantially the same purpose and effect as this section and to be part of the cost of the project for which Federal financial assistance is available.

(b) In addition to amounts otherwise authorized by this title, the State agency shall make a payment to any individual or family displaced from any dwelling not eligible to receive a payment under subsection (a) of this section which dwelling was actually and lawfully occupied by such individual or family for not less than 90 days prior to the initiation of negotiations for acquisition of such property. Such payment, not to exceed $1,500, shall be the amount which is necessary to enable such person to lease or rent for a period not to exceed 2 years, or to make the down payment on the purchase of, a decent, safe, and sanitary dwelling of standards adequate to accommodate such individual or family in areas not generally less desirable in regard to public utilities and public and commercial facilities.

§507. Expenses incidental to transfer of property

(a) In addition to amounts otherwise authorized by this title, the State shall reimburse the owner of real property acquired for a project for reasonable and necessary ex-

penses incurred for (1) recording fees, transfer taxes, and similar expenses incidental to conveying such property; (2) penalty costs for prepayment of any mortgage entered into in good faith encumbering such real property if such mortgage is on record or has been filed for record under applicable State law on the date of final approval by the State of the location of such project; and (3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting of title in the State, or the effective date of the possession of such real property by the State, whichever is earlier.

(b) No payment received under this chapter shall be considered as income for the purposes of the Internal Revenue Code of 1954, or for the purpose of determining the eligibility or the extent of eligibility of any person for assistance under the Social Security Act or any other Federal law.

§508. Relocation services

(a) Each State shall provide a relocation advisory assistance program which shall include such measures, facilities, or services as may be necessary or appropriate in order—

(1) to determine the needs, if any, of displaced families, individuals, business concerns, and farm operators for relocation assistance;

(2) to assure that, within a reasonable period of time, prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the fam-

ilies and individuals displaced, housing meeting the standards established by the Secretary for decent, safe, and sanitary dwellings, equal in number to the number of, and available to, such displaced families and individuals and reasonably accessible to their places of employment;

(3) to assist owners of displaced businesses and displaced farm operators in obtaining and becoming established in suitable locations; and

(4) to supply information concerning the Federal Housing Administration home acquisition program under section 221(d) (2) of the National Housing Act, the small business disaster loan program under section 7(b) (3) of the Small Business Act, and other State or Federal programs offering assistance to displaced persons.

(b) Nothing in this chapter shall be construed to prohibit any person from exercising any right or remedy available to him under State law with respect to any action of a State agency in carrying out this chapter.

§509. Relocation assistance programs on Federal highway projects

Notwithstanding any other provision of law, on and after the effective date of this title any Federal agency which acquires real property for use in connection with a highway project authorized by section 107 and chapter 2 of this title or any other Federal law shall, in accordance with regulations issued by the Secretary, provide the payments and services described in sections 502, 505, 506, 507, and 508 of this title. When real property is acquired by a

State or local governmental agency for such a Federal project for purposes of this chapter, the acquisition shall be deemed an acquisition by the Federal agency having authority over such project.

§510. Authority of the Secretary

(a) To carry into effect the provisions of this chapter, the Secretary is authorized to make such rules and regulations as he may determine to be necessary to assure—

(1) that the payments authorized by this chapter shall be fair and reasonable and as uniform as practicable;

(2) that a displaced person who makes proper application for a payment authorized for such person by this chapter shall be paid promptly after a move or, in hardship cases, be paid in advance; and

(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the head of the State agency making such determination.

(b) The Secretary may make such other rules and regulations consistent with the provisions of this chapter as he deems necessary or appropriate to carry out this chapter.

§511. Definitions

As used in this chapter—

(1) The term "person" means—

(A) any individual, partnership, corporation, or association which is the owner of a business;

(B) any owner, part owner, tenant, or sharecropper who operates a farm;

(C) an individual who is the head of a family; or

(D) an individual not a member of a family.

(2) The term "family" means two or more individuals living together in the same dwelling unit who are related to each other by blood, marriage, adoption, or legal guardianship.

(3) The term "displaced person" means any person who moves from real property on or after the effective date of this chapter as a result of the acquisition or reasonable expectation of acquisition of such real property, which is subsequently acquired, in whole or in part, for a Federal-aid highway, or as the result of the acquisition for a Federal-aid highway of other real property on which such person conducts a business or farm operation.

(4) The term "business" means any lawful activity conducted primarily—

(A) for the purchase and resale, manufacture, processing, or marketing of products, commodities, or any other personal property;

(B) for the sale of services to the public; or

(C) by a nonprofit organization.

(5) The term "farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities for sale and home use, and customarily producing such products or commodities in sufficient quantity to be

capable of contributing materially to the operator's support.

(6) The term "Federal agency" means any department, agency, or instrumentality in the executive branch of the Government and any corporation wholly owned by the Government.

(7) The term "State agency" means a State highway department or any agency designated by a State highway department to administer the relocation assistance program authorized by this chapter.

FEDERAL-AID HIGHWAY ACT OF 1970

(Pub. L. 91-605, Dec. 31, 1970)

Construction of Replacement Housing

Sec. 117. (a) Sections 510 and 511 of title 23, United States Code including all references thereto are hereby renumbered as sections 511 and 512 respectively.

(b) Chapter 5 of title 23, United States Code, is amended by inserting immediately after section 509 the following new section:

"§510. Construction of replacement housing

"(a) The Secretary may approve as a part of the cost of construction of any project on any Federal-aid system the cost of (A) constructing new housing, (B) acquiring existing housing, (C) rehabilitating existing housing, and (D) relocating existing housing, as replacement housing for individuals and families where a proposed project on the Federal-aid system cannot proceed to actual construction because replacement housing is not available and cannot otherwise be made

available as required by section 502 of this title. For the purposes of this subsection the term 'housing' includes all appurtenances thereto.

"(b) State highway departments shall, wherever practicable, utilize the services of State or local governmental housing agencies in carrying out this section."

(c) The analysis of chapter 5 of title 28, United States Code, is amended by adding after

"509. Relocation assistance programs on Federal highway projects."

the following:

"510. Construction of replacement housing."

(d) The definition of the term "construction" in section 101(a) of title 23, United States Code, is amended to read as follows:

"The term 'construction' means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the Coast and Geodetic Survey in the Department of Commerce), acquisition of rights-of-way, relocation assistance, elimination of hazards of railway grade crossings, acquisition of replacement housing sites, and acquisition, and rehabilitation, relocation, and construction of replacement housing."

Appendix A

EFFECTIVE DATE OF RELOCATION PROVISIONS

Sec. 120. Section 37 of the Federal-Aid Highway Act of 1968 is amended to read as follows:

"EFFECTIVE DATE

"Sec. 37. (a) Except as otherwise provided in subsection (b) of this section, this Act and the amendments made by this Act shall take effect on the date of its enactment, except that until July 1, 1970, sections 502, 505, 506, 507, and 508 of title 23, United States Code, as added by this Act, shall be applicable to a State only to the extent that such State is able under its laws to comply with such sections. Except as otherwise provided in subsection (b) of this section, after July 1, 1970, such sections shall be completely applicable to all States. Section 133 of title 23, United States Code, shall not apply to any State if sections 502, 505, 506, 507, and 508 of title 23, United States Code, are applicable in that State, and effective July 1, 1970, such section 133 is repealed, except as otherwise provided in subsection (b) of this section.

"(b) In the case of any State (1) which is required to amend its constitution to comply with sections 502, 505, 506, 507, and 508 of title 23, United States Code, and (2) which cannot submit the required constitutional amendment for ratification prior to July 1, 1970, the date of July 1, 1970, contained in subsection (a) of this section shall be extended to July 1, 1972."

Appendix A

FAIR HOUSING ACT OF 1968

(42 U.S.C. §3601 *et seq.*)

(Pub. L. 90-284, Title VIII, April 11, 1968, 82 Stat. 81)

§3601. Declaration of policy.

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

§3608. Administration-Authority and responsibility

(a) .....

(b) .....

Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes.

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

APPENDIX B

Regulations & Policy Directives

Circular Memorandum dated January 23, 1968 (Pl. Ex. No. 9), appears in the separate Appendix at pp. 79a-81a.

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

September 5, 1968

INSTRUCTIONAL MEMORANDUM 80-1-68
34-10

SUBJECT: Relocation Assistance and Payments — Interim Operating Procedures (RCS 34-01-03) (B/B 04-R-2211)

There are enclosed Interim Operating Procedures covering the administration of the Highway Relocation Assistance Program established by Chapter 5 of Title 23, U.S.C.

These procedures supersede paragraph 3 of PPM 80-5 and will be incorporated in a new Policy and Procedure Memorandum after a period of operation thereunder.

/s/ F. C. TURNER
F. C. Turner
Director of Public Roads

/s/ LOWELL K. BRIDWELL
Lowell K. Bridwell
Federal Highway Administrator

Appendix B

[Including Amendments of Paragraphs 5a(2), 5a(5), 7b(2) and 9c(2) dated October 2, 1968 and November 5, 1968]

Interim Operating Procedures Relocation Assistance and Payments

1. Purpose

In accordance with Chapter 5 of Title 23, U.S.C., this memorandum prescribes policies and procedures relating to the following:

a. Administration of the relocation program and the provision of relocation payments and services to individuals, families, businesses, and farm operators displaced by Federal-aid highway construction;

b. Eligibility for reimbursement of relocation payments and costs of services by State and State designated agencies; and

c. Relocation payment records and relocation advisory assistance reports.

2. Effective Date and Applicability

a. The provisions of this memorandum are effective August 23, 1968, and the payments and services described herein shall be provided by the State to the extent that such State is able to comply herewith under its laws. After July 1, 1970, such payments and services shall be provided by all States.

b. The provisions of this memorandum are applicable to the following:

(1) All Federal-aid highway projects authorized after August 23, 1968, involving rights-of-way which are occu-

pied by an individual, family, business, farm operator, or nonprofit organization.

(2) All Federal-aid highway projects authorized on or before August 23, 1968, on which individuals, families, businesses, farm operations, and nonprofit organizations have not been displaced.

(3) Rights-of-way acquired without Federal participation upon which the State intends to construct a Federal-aid project from which as of August 23, 1968, individuals, families, business, farm operations, and nonprofit organizations have not been displaced.

c. The relocation payments and services described in this memorandum shall be provided by any Federal agency which acquires property for highway projects authorized under Chapters 1 and 2 of Title 23, U.S.C. When real property is acquired by a State or local governmental agency for such a Federal project, the acquisition shall be deemed to be an acquisition by the Federal agency having authority over such project.

3. AUTHORITY

Statutory authority for this memorandum is set forth in Chapter 5 of Title 23, U.S.C. (23 U.S.C. 501 *et seq.*)

4. PROGRAMMING

. . .

b. Any project agreement with a State which was executed on or before August 23, 1968, and which requires the use of property not acquired as of that date shall be amended to include the cost of providing the payments and services described in this memorandum. Any number of

projects may be amended in a single action with each project identified. Form PR-37, Project Status Record, must be prepared for each project as required by Volume 22, Chapter V, Administrative Manual. Attach a copy of the modified agreement to each PR-37.

5. Assurances of Adequate Relocation Assistance Program

a. No State highway department shall be authorized to proceed with any phase of any project which will cause the displacement of any person or any construction project concerning any right-of-way acquired by the State without Federal participation and coming within the provisions of paragraph 2b(3) above, until it has furnished satisfactory assurances to the extent State law permits, that:

(1) Relocation payments and services were or will be provided as set forth in paragraphs 6-10 of this memorandum.

(2) In the event housing available to persons without regard to race, color, religion or national origin will not be available within a reasonable period of time prior to displacement as provided in paragraph 7 of this memorandum, the State shall provide a detailed statement specifying the respects in which such assurance cannot be furnished, the extent to which such housing will be available prior to displacement, the period of time prior to displacement when that housing will become available and an estimate of the additional time within which such housing will become available to the extent that it can be reasonably accomplished.

Appendix B

(3) The public was or will be adequately informed of the relocation payments and services which will be available, as set forth in paragraph 12 of this memorandum.

(4) No person lawfully occupying the real property shall be required to move from his home, farm or business location without at least 90 days written notice of the intended vacation date from the State or political subdivision having responsibility for such acquisition. This provision must be carried out to the maximum extent practicable and exceptions should be made only in the case of very unusual conditions. Such assurance can be furnished on a Statewide basis or set forth in Point 31 of the State's statement of organization and procedures.

(5) The State's relocation program is realistic and is adequate to provide orderly, timely, and efficient relocation of displaced individuals and families to decent, safe, and sanitary housing available to persons without regard to race, color, religion or national origin with minimum hardship on those affected.

b. The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The state will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum.

c. The State's assurances shall be accompanied by a statement in which it specifies the provisions of this memorandum with which it is unable under its laws to comply in whole or in part. In the event a State maintains that it is legally unable to comply fully with one or more of the provisions of this memorandum, its statement shall be

supported by an opinion of the chief legal officer of the highway department in which he discusses the legal issues raised and cites reasons and authorities in support of his conclusion for each representation of legal inability to comply.

6. Administration of the Relocation Assistance Program

a. In order to prevent unnecessary expenses and duplication of functions, the State highway department may make relocation payments or provide relocation assistance or otherwise carry out the functions described in this memorandum by utilizing the facilities, personnel, and services of any other Federal, State, or local governmental agency having an established organization for conducting relocation assistance programs.

b. Where a State highway department elects to have the relocation payments and services required under this PPM administered by another Federal, State, or local agency, it shall enter into a written contract or agreement to that effect with the agency it selects. Such contract or agreement shall be subject to the approval of the division engineer and shall obligate the agency to perform the services and make the payments in accordance with Chapter 5 of Title 23, U.S.C., and the regulations and procedures of the Bureau of Public Roads. The contract shall also provide that the records required by paragraph 15 of this memorandum will be retained by the agency administering the relocation program for a period of not less than three years after payment of the final voucher with respect to the particular project, or that these records will be turned over to the

State highway department. In the event these records are turned over to the highway department, that department will retain them for a like period. These records shall be made available for inspection by representatives of the Federal Government at any reasonable hour. Where the contract is with a public agency administering another Federal grant program, the contract shall specify the financial responsibilities of each to finance the relocation program required by this memorandum.

c. The State highway department shall, under Point 31 of its policy and procedural statement, identify the office in the State highway department which has Statewide responsibility for implementing the relocation program, the director of that office, and the State agency which will administer the relocation program. It shall also include the estimated number and job titles of personnel in the State highway department and the State agency who have direct responsibility for providing relocating payments and services.

d. The organization and procedures of the State agency which administers the relocation program shall provide as a minimum that:

(1) Each right-of-way project shall have assigned to it one or more individuals whose primary responsibility is to provide relocation assistance. These individuals may have responsibility for more than one project where reasonable.

(2) A local subsidiary office will be established which is reasonably convenient to public transportation or within walking distance of each project when the division engineer determines, after consultation with the State, that the volume of work or the needs of the displaced persons are such

as to justify the establishment of such an office. These offices shall be open during hours convenient to the persons to be displaced, including at least one and preferably more evenings per week if necessary.

(3) Regardless of whether a local office is established, personal contact will be made with each person as defined in paragraph 17, to be displaced to explain the relocation payments and assistance which are available and to assist in completing any applications required. If such contact cannot be made, the State agency shall furnish documentation to show that reasonable efforts have been made to achieve this contact.

(4) Relocation officials shall maintain personal contact with and shall exchange information with other agencies rendering services useful to displaced persons. Such agencies include social welfare agencies, urban renewal agencies, redevelopment authorities, public housing authorities, the Federal Housing Administration, Veterans Administration and Small Business Administration. Personal contact shall also be maintained with local sources of information on private replacement properties, including real estate brokers, real estate boards, property managers, apartment owners and operators, and home building contractors. Subscriptions may be maintained for multiple listing services, apartment directory services, neighborhood and metropolitan newspapers, etc.

(5) The local relocation office shall maintain and provide:

(a) lists of replacement dwellings available to persons without regard to race, color, religion or national origin drawn from various sources, suitable in price, size and

condition for displaced persons to the extent they are available;

(b) current data for such costs as security deposits for utilities, damages, and leases, closing costs, typical down-payments, and interest rates and terms;

(c) maps showing the location of schools, parks, playgrounds, shopping and public transportation routes in the area, and

(d) schedules and costs of public transportation.

(6) Other recommended information to be provided by relocation offices includes copies of the State's brochure explaining its relocation program, local ordinances pertaining to housing, building codes, and open housing; FHA and VA booklets of information on inspecting and evaluating replacement housing; and consumer education literature on housing, shelter costs and family budgeting.

7. Development of Relocation Program Plan

The planning for the relocation program shall be accomplished in stages:

a. Conceptual Stage. A project will be considered to be in this stage until such time as the final location is approved. At this stage the tenant is not to be disturbed in any way. The cost incurred in connection with securing this information is chargeable to preliminary engineering. Prior to the completion of this stage and prior to the public hearing, the State shall make preliminary investigations which will furnish the following information for each of the various alternative locations given final consideration.

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(1) Approximate number of individuals, families, businesses, farms, and nonprofit organizations that would be displaced.

(2) The probable availability of decent, safe, and sanitary replacement housing within the financial means of those displaced.

(3) The basis upon which the above findings were made and a statement relative thereto by the State to the Bureau of Public Roads.

b. Right-of-Way Acquisition and/or Construction Stage.

The State highway department, prior to proceeding with right-of-way negotiations and/or construction shall furnish the following information for review and approval by the division engineer:

(1) The methods and procedures by which the needs of every individual to be displaced will be evaluated and correlated with available decent, safe, and sanitary housing at reasonable rents or prices and readily accessible to his place of employment.

(2) The method and procedure by which the State will assure an inventory of currently available comparable housing available to persons without regard to race, color, religion or national origin which is decent, safe, and sanitary, including type of building, state of repair, number of rooms, needs of the person or family being displaced (based on standards outlined in paragraph 13a), type of neighborhood, proximity of public transportation and commercial shopping areas, and distance to any pertinent social institutions, such as church, community facilities, etc. The use of maps, plats, charts, etc., would be useful at this stage.

(3) An analysis relating to the characteristics of the inventories so as to develop a relocation plan which will:

(a) outline the various relocation problems disclosed by the above survey;

(b) provide an analysis of Federal, State and community programs affecting the availability of housing currently in operation in the project area;

(c) provide detailed information on concurrent displacement and relocation by other governmental agencies or private concerns;

(d) provide an analysis of the problems involved and the method of operation to resolve and relocate the relocatees.

(e) estimate the amount of leadtime required and demonstrate its adequency to carry out a timely, orderly and humane relocation program;

(f) assure no person lawfully occupying real property shall be required to move without at least 90 days written notice; and

(g) furnish the names of the agency or agencies, if other than the State, which will provide the relocation assistance including an analysis of their present workload and ability to perform and the estimated number and job titles of relocation personnel servicing the project.

9. Replacement Housing

a. General Provisions

In addition to other payments authorized by this memorandum, individuals and families displaced from dwellings on real property acquired for a Federal-aid project are en-

titled to supplementary payments in accordance with this paragraph. The State highway department or the agency administering the relocation program shall develop procedures to implement this paragraph, which shall be submitted to the division engineer for his approval. Such procedures shall be designed to assure that the availability of these payments is brought to the attention of all eligible persons as provided in paragraphs 6 and 12 of this memorandum.

* * * * *

c. Payment to owner-occupants displaced from dwellings who do not qualify for payments under 9(b) and individuals or families who are occupying rental or leased space.

In addition to the moving cost payments to which they are entitled under the provisions of paragraph 8c of this memorandum, owner-occupants who do not qualify for payment under paragraph 9b and tenants who are displaced by a highway project are entitled to the following payments if they have lawfully occupied the dwelling taken for at least 90 days prior to the initiation of negotiations for such property.

(1) An individual or family renting a dwelling unit taken for a project is entitled to a payment to enable him to rent or purchase decent, safe, and sanitary housing. The amount of the payment shall be determined by subtracting 24 times the amount which the displaced individual or family paid in rent for the last month immediately before being required to move, or 24 times the economic rent as established by the State's appraisal process for his dwelling unit, whichever is the lesser, from the amount necessary to rent a decent, safe, and sanitary dwelling for the next two years, but in no event shall this amount exceed $1,500. Where rent

is being paid to a State or political subdivision thereof economic rent shall be used in determining the amount of payment to which the relocatee is entitled.

(2) An owner-occupant who is not eligible for payment because he had not actually owned and occupied his dwelling for at least one year prior to the initiation of the negotiation for the acquisition of that property by the State or has elected not to purchase a new property shall be entitled to the following payment: A sum equal to the difference, if any, between the cost of renting for the next two years a decent, safe, and sanitary dwelling adequate to accommodate him and his family in an area not generally less desirable in regard to public utilities and commercial facilities than the area from which he was displaced and 12 percent of the acquisition price of the property taken, but in no event may this payment exceed $1,500 or the amount which the owner-occupant would have received had he been eligible for a payment under paragraph 9b, whichever is the lesser. This may be used as a rent supplement or for a downpayment on the purchase of a dwelling.

g. Hardship cases

In cases of extreme hardship or other similar extenuating circumstances, exceptions to the decent, safe, and sanitary characteristics of replacement housing may be permitted in particular cases and the displaced individual or family still qualify for a payment under this paragraph. Such exceptions will only be made with the written concurrence of the Regional Federal Highway Administrator.

11. Appeals

a. An applicant for a payment under paragraphs 8, 9, or 10 of this memorandum shall be notified promptly in

writing concerning his eligibility for the payment claimed; the amount, if any, he is entitled to receive; and the time and manner in which such payment will be made. Such notification shall also inform the applicant of his right to appeal and the procedures therefor, in the event the applicant is dissatisfied with the initial ruling on his application for such payments:

b. The head of the State agency shall establish procedures, consistent with the applicable State law, for reviewing appeals under this memorandum. Those procedures shall provide, at the minimum, that any person taking such an appeal shall be given (1) full opportunity to be heard and (2) a prompt decision giving reasons in support of the result reached.

c. The State highway department shall submit to the division engineer under Point 31 of its policy and procedural statement the procedure which has been established for review of determinations under paragraphs 8, 9, and 10 of this memorandum.

12. PUBLIC INFORMATION

In order to assure that the public has adequate knowledge of the relocation program, the State highway department shall include with requests for authorizations to proceed on projects causing displacement a statement that it has or will take the following steps:

a. The relocation program described in paragraphs 6 through 11 of this memorandum has been discussed at all public hearings required by 23 U. S. Code 128 and the PPB's implementing that section. The State shall prepare a brochure describing its relocation program and distribute

the same without cost at all public hearings and to all other individuals and organizations as appropriate. The brochure shall state where copies of any State regulations implementing the relocation assistance program can be obtained:

b. The State agency shall provide full and adequate public notice of the relocation payments to be made and services to be rendered. Such public notice shall include the utilization of local newspapers, radio, and television stations (with particular emphasis on those which are read or listened to by the residents on the project) and local meetings for dissemination of news releases, advertisements, announcements and the like.

c. The State agency shall prepare and furnish each individual, family, business, and farm operator to be displaced by the project a written description of the (1) location assistance payments and services available; (2) the eligibility requirements and procedures for obtaining these payments and services; and (3) the right to appeal and procedure for appealing to the head of the State agency or the official designated to act for him. The above information shall be furnished by means of personal contact with those to be displaced unless an alternative method is approved by the division engineer. This information shall be furnished simultaneously with the initiation of negotiations for the property involved, and to tenants not later than 15 days after a contract for the purchase of property involved has been entered into. In no event shall such notice be less than 90 days prior to the date the tenant will be required to move. The individual furnishing this information shall document the file to that effect.

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13. Standards for Decent, Safe and Sanitary Housing

a. A decent, safe, and sanitary dwelling is one which meets all of the following minimum requirements:

(1) Conforms with all applicable provisions for existing structures that have been established under State or local building, plumbing, electrical, housing and occupancy codes and similar ordinances or regulations applicable to the property in question.

(2) Has a continuing and adequate supply of potable safe water.

(3) Has a kitchen or an area set aside for kitchen use which contains a sink in good working condition and connected to hot and cold water, and a sewage disposal system. A stove and refrigerator in good operating condition shall be provided when required by local codes, ordinances or custom. When these facilities are not so required by local codes, ordinances, or custom the kitchen area or area set aside for such use shall have utility service connections and adequate space for the installation of such facilities.

(4) Has an adequate heating system in good working order which will maintain a minimum temperature of 70 degrees in the living area under local outdoor design temperature conditions. A heating system will not be required in those geographical areas where such is not normally included in new housing.

(5) Has a bathroom, well lighted and ventilated and affording privacy to a person within it, containing a lavatory basin and a bathtub or stall shower, properly connected to an adequate supply of hot and cold running

water, and a flush water closet, all in good working order and properly connected to a sewage disposal system.

(6) Has provision for artificial lighting for each room.

(7) Is structurally sound, in good repair and adequately maintained.

(8) Each building used for dwelling purposes shall have two safe unobstructed means of egress leading to safe open space at ground level. Each dwelling unit in a multi-dwelling building must have access either directly or through a common corridor to two means of egress to open space at ground level. In buildings of three stories or more, the common corridor on each story must have at least two means of egress.

(9) Has 150 square feet of habitable floor space for the first occupant in a standard living unit and at least 100 square feet of habitable floor space for each additional occupant. The floor space is to be subdivided into sufficient rooms to be adequate for the family. All rooms must be adequately ventilated. Habitable floor space is defined as that space used for sleeping, living, cooking or dining purposes, and excludes such enclosed places as closets, pantries, bath or toilet rooms, service rooms, connecting corridors, laundries, and unfinished attics, foyers, storage spaces, cellars, utility rooms and similar spaces.

b. Rental of sleeping rooms. The standards for decent, safe, and sanitary housing as applied to the rental of sleeping rooms shall include the minimum requirements contained in subparagraphs a(1), (4), (6), (7) and (8) of this paragraph and the following:

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(1) At least 100 square feet of habitable floor space for the first occupant and 50 square feet of habitable floor space for each additional occupant.

(2) Lavatory and toilet facilities that provide privacy including a door that can be locked if such facilities are separate from the room.

(c) In lieu of the standards listed in this paragraph the agency providing the relocation assistance described in the PPM may submit for approval by the Director of Public Roads a local housing code by means of which the decent, safe, and sanitary nature of replacement housing for a project is to be judged. Any code so submitted shall be reasonably comparable to the list of standards incorporated in this paragraph.

d. The Director of Public Roads may approve exceptions to the standards in this paragraph where unusual conditions exist.

17. DEFINITIONS

As used in this PPM

* * * * *

c. *Displaced Person*

The term "displaced person" means any person who moves from real property on or after the effective date of this memorandum as a result of the acquisition or reasonable expectation of acquisition of such real property which is subsequently acquired, in whole or in part, for a Federal-aid highway, or as the result of the acquisition for a Federal-aid highway or other real property on which such person conducts a business or farm operation. A person who moves

from real property which is subsequently acquired for a Federal-aid highway as a result of the "reasonable expectation of acquisition of such real property" is one who moves from such property (1) after notification by the State highway department that the property is to be acquired for a project, or after the location of the highway has been definitely established and approved by the Bureau of Public Roads and (2) within 12 months before the property is scheduled to be taken by the State;

* * * * *

f. *Federal Agency*

The term "Federal agency" means any department, agency or instrumentality in the executive branch of the government and any corporation wholly owned by the government.

g. *State Agency*

The term "State agency" means a State highway department or any agency designated by a State highway department to administer the relocation assistance program authorized by Chapter 5, Title 23, U.S.C.

h. *Displacement*

The vacating by the eligible person of real property after the happening of any one of the following events shall be deemed to be a displacement as a result of the acquisition or clearance of right-of-way for or construction of a Federal-aid highway project:

(1) The State highway department or political subdivision becomes entitled to possession of the real property

pursuant to an agreement or a court order in a condemnation proceeding instituted for the purpose of acquiring title.

(2) Title to the real property is conveyed to the State highway department or political subdivision by the owner thereof.

(3) A binding contract for the purchase of the real property is entered into by the State highway department or political subdivision and the owner of such real property, if the real property is not occupied by another eligible person prior to acquisition of title or right of possession.

(4) Public Roads authorizes the State to proceed with the relocation prior to actual acquisition of title or possession of the real property by the State highway department, or political subdivision.

(5) Any other move from real property subsequently acquired for a Federal-aid highway, which takes place as a result of the reasonable expectation that the property will be acquired for the highway, shall be deemed a displacement caused by the highway project for purposes of this PPM.

* * * * *

Appendix B

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

December 26, 1968

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers

FROM: J. A. Swanson, Director of Right-of-Way and
34–10 Location Washington, D. C. s/ John A. Swanson

SUBJECT: Relocation Procedures

A question has arisen as to whether it is necessary for a State to furnish all of the information required by paragraph 7b of IM 80-1-68 if the State's legal opinion and assurances indicate that the State cannot under present State law conform to the requirements of the 1968 Act relative to making replacement housing payments to enable displaced persons to move into decent, safe and sanitary housing.

Under such circumstances the State cannot reasonably be expected to furnish all of the information required by paragraph 7b. The State should, however, survey the available housing and have information relative thereto accessible to the relocatees in accordance with the requirements of paragraph 6d(5). Under paragraph 7b(3) the division engineer should insist that the State furnish an analysis of the relocation problems and possible solutions in sufficient detail to enable him to determine the advisability of

proceeding with the project and to assure that no relocatee will be required to move unless there is satisfactory replacement housing available to him. The State should, of course, make every effort that it can under existing law to see that the displacee is relocated in decent, safe and santitary housing.

When he is satisfied that conditions exist which will result in fair and equitable treatment of the relocatees the division engineer may authorize negotiations and/or construction even though the State cannot make the payments to place the relocatees in decent, safe and sanitary housing.

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U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

February 12, 1969

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers

FROM: J. A. Swanson, Director of Right-of-Way and
34–10 Location Washington, D. C. s/ John A. Swanson

SUBJECT: Relocation Procedures—Going Projects

Paragraphs 2 (b) (2) and (3) of IM 80-1-68 state that its provisions are applicable to all active Federal-aid projects and to all other active projects upon which the State later intends to construct a Federal-aid project where there remain individuals families, businesses, farm operations, and non-profit organizations which will be displaced.

In accomplishing the planning for the relocation program required under paragraph 7, the State should undertake such planning on all active projects to the extent that it is reasonable and proper. Each such project undoubtedly will involve a different set of circumstances and conditions. It, therefore, will be necessary for the division engineer to carefully review the status of each project before issuing any additional authorizations to acquire right-of-way or to authorize construction on a project for which right of way was acquired after August 23, 1968, irrespective of the source of funds utilized for such acquisition, to assure

himself that the State has or will make the necessary relocations without undue hardship to the relocatees. If a major portion of the relocations have previously been accomplished very little good would result from going through the conceptual stage study. However, if a substantial number of persons remain to be relocated at any time an authorization is requested which would require such relocation, it would seem that the division engineer would need to have the information required by paragraph 7b. Some variation may be permitted by the division engineer when the circumstances warrant.

It should always be borne in mind that regardless of the information furnished at this stage of the project it is the responsibility of the State to furnish relocation assistance, and payments where authorized by State law, in accordance with the requirements of the law and the Im. At no time should a relocatee be forced into housing less desirable than that from which he was required to move and to the extent possible under State law all relocations should be made to decent, safe and sanitary dwellings.

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MEMORANDUM

DEPARTMENT OF TRANSPORTATION
Office of the Secretary

Date: January 15, 1970

SUBJECT: Implementation of Replacement Housing Policy

FROM : The Secretary

TO : Commandant, United States Coast Guard
Federal Aviation Administrator
Federal Highway Administrator
Federal Railroad Administrator
Urban Mass Transportation Administrator

I have reviewed the procedures for implementation of the DOT replacement housing policy as submitted in response to my October 20, 1969, memorandum.

I find that some of the submissions should be improved to clearly emphasize and cover certain aspects of this new policy. Ordinarily I would request that the necessary changes be made and the procedures resubmitted to me for final approval. However, I consider this new policy so important that I am approving the procedures at this time so that you can make the necessary changes and place them into effect without delay. For your assistance in this regard, attached are copies of all of the proposed procedures submitted. The procedures for the Federal Railroad Administration are still being developed and will be provided other addresses by the Federal Railroad Administrator directly.

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Each of you should reexamine your proposed procedures and make any modifications or changes necessary to make certain that they emphasize and provide full and specific coverage of the following points:

1. Specific written assurances that adequate replacement housing will be available or provided for (built, if necessary) will be required before the *initial* approval or endorsement of any project.

2. Construction will be authorized only upon verification that replacement housing is in place and has been made available to all affected persons.

3. All replacement housing must be fair housing—open to all persons regardless of race, color, religion, sex or national origin. This is in addition to the requirement that replacement housing must be offered all affected persons regardless of their race, color, religion, sex or national origin. Coverage of these two points is consistent with the requirements of Title VIII of the Civil Rights Act of 1968 and Title VI of the Civil Rights Act of 1964.

Copies of your final procedures to implement this policy should be submitted to the Department Director of Civil Rights as soon as possible.

/s/ JOHN VOLPE

Attachments

Appendix B

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

April 10, 1970

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers

FROM : John A. Swanson, Associate Director
34—10 for Right-of-Way and Location
Washington, D.C.

SUBJECT: Relocation Assistance—Availability of Replacement Housing (Supersedes White Circular Memorandum dated March 27, 1970)

This memorandum is applicable to the following:

a. All Federal-aid or any other highway projects financed in whole or in part with Federal-aid highway funds or other Federal funds authorized on or after May 1, 1970, involving rights-of-way which are occupied by an individual or family.

b. All Federal-aid or any other highway project financed in whole or in part with Federal-aid highway funds or other Federal funds authorized prior to May 1, 1970, on which individuals or families are still to be displaced as of May 1, 1970.

The division engineer shall not authorize any phase of construction (clearance of right-of-way regardless of how

performed is considered to be a construction phase insofar as this memorandum is concerned) which would require the displacement of individuals or families, or permit the dislocation of individuals or families on any such project or on any project already authorized, until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the State offers him adequate replacement housing which is available for immediate occupancy.

Such replacement housing shall be:

a. Fair housing—open to all persons regardless of race, color, religion, sex, or national origin.

b. In areas not generally less desirable in regard to:

1. Public utilities

2. Public and commercial facilities

c. Available at rents or prices within the financial means of the families and individuals displaced.

d. Decent, safe and sanitary.

e. Reasonably accessible to the displacees' places of employment.

f. Adequate to accommodate the displacee.

The applicable PPM's and IM's are being revised to conform to the above policy.

Appendix B

UNITED STATES GOVERNMENT
Memorandum

DEPARTMENT OF TRANSPORTATION
Office of the Secretary

Date, November 6, 1970

SUBJECT: Interstate Highway 77—Triangle area
Charleston, West Virginia

FROM : Under Secretary of Transportation

To : Federal Highway Administrator

The Secretary has reviewed this subject matter in depth and has determined that the FHWA approval of the Department of Highways location of I-77 within the Triangle Area is reaffirmed subject to the understanding, as regards the segment from Elk River to the Pennsylvania Railroad that:

(1) Appropriate steps have been taken and will continue to insure that all relocation resources are available to the relocatees on a fair housing basis.

(2) Every effort will be made through coordination with the Charleston Urban Redevelopment Authority and its HUD financed programs to assist in low-income rental housing being available beyond the end of the 2-year rent supplement period, provided by the highway program.

(3) Further construction involving the Triangle Area will be authorized only after the people now living within the right-of-way in that area have been relocated

into adequate decent, safe and sanitary housing, in accordance with DOT Order 5620.1.

(4) A continuous elevated viaduct design will be employed from Elk River to Capitol Street, suitable to the development of other land uses underneath and adjacent to the viaduct.

(5) Future use of land adjacent to and underneath the Interstate highway will be coordinated with local and State officials and the Charleston Urban Redevelopment Authority for the enhancement of the proposed urban redevelopment projects including commercial enterprises between Elk River and Capitol Street.

Subject to the above-listed understanding, projects now under suspension may be reactivated and you may authorize resumption of planning and design activities of various phases of work which are necessary to expedite construction. The demolition of buildings in the Triangle Area in order to prevent vandalism, occupation by squatters, and in the interest of public health, may be authorized at the discretion of the Division Engineer as the relocation of persons is accomplished.

You are asked to make immediate contact with the Department of Housing and Urban Development to insure full coordination and a minimum of delay in concurrent advancement of its programs for redevelopment of the Triangle Area.

/s/ JAMES M. BEGGS
James M. Beggs

APPENDIX C

Legislative History of 1968 Relocation Amendments to Federal-Aid Highway Act

The 1968 relocation amendments to the Federal-Aid Highway Act resulted from a decade of efforts "to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."[1] The background and history of this effort demonstrates that the amendments were designed to remedy a serious national wrong.

In 1962, President Kennedy recommended to Congress that a relocation program of the type required under urban renewal law[2] be extended to the Federal-Aid Highway program.[3] The response to the recommendation, 23 U.S.C.

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[1] 23 U.S.C. §501. The Senate report on the legislation noted:

> The problem of providing adequate relocation assistance to those persons . . . displaced by highway construction on the Federal-Aid system has long been a subject of the committee's attention.

1968 U.S. Code Cong. Ad. News 3487.

In support of a relocation bill proposed in 1957, one year after the first Federal-Aid Highway Act, Senator Javits said:

> It is our aim to ease in every way the burdens of moderate and low income families which are most frequently displaced . . . as a result of major public improvements in which the United States participates. . . . We should do everything we can toward this objective of humanitarianism and justice.

103 Cong. Rec. 5316-7 (1957).

[2] See 42 U.S.C. §1465.

[3] *The Transportation System of Our Nation*, Message to Congress, April 5, 1962, House Document No. 384.

§133[4] required assurances of "relocation advisory assistance" and authorized the payment of minimal relocation assistance to dislocatees.[5] Significantly, Congress limited the applicability of those requirements to projects approved after the effective date of the act,[6] a limitation not found in the 1968 act.

The inadequacies of the 1962 act soon became manifest[7] and the ever-increasing human disruption caused by highway displacement was emphasized for Congress by three successive government studies. Each pointed out the hardships created by the lack of sufficient relocation housing and assistance, and each called for the kind of remedial action which the 1968 amendments provide.

The first was the work of a select subcommittee of the House Committee on Public Works.[8] Its central findings confirmed that displacement caused by federally assisted programs severely disadvantaged the poor and minority groups:

> Most displacements affect low- or moderate-income families or individuals, for whom a forced move is a

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[4] Repealed by the 1968 law, Pub. L. 90-495 §37.

[5] Limited to $200 for individuals or families and $3000 for businesses, 23 U.S.C. §133 (d).

[6] 23 U.S.C. §133 (e), Br. App. 2, *supra*.

[7] In the words of Judge Sobeloff: "The cold administrative indifference to the plight of those left without roofs over their heads mounted to the level of a national scandal." App. 74a, 429 F.2d at 424. The one case construing §133 held, not surprisingly, that its requirement of advisory assistance does not compel the state to provide actual housing. *Small* v. *Ives*, 296 F. Supp. 448, 455 (D. Conn. 1968) (3-judge court).

[8] Select Committee on Real Property Acquisition, *Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs*, 88th Cong., 2nd Sess. (1964). (Committee Print No. 31.)

> very difficult experience. The problem is aggravated for the elderly, the large family, and the nonwhite displacee. The lack of standard housing at prices or rents that low- or moderate-income families can afford is the most serious relocation problem.[9]

The committee's findings were confirmed in a report of the Advisory Commission on Intergovernmental Relations[10] which further emphasized that the burdens of displacement fall unevenly on the poor and nonwhite. A principle problem which it noted was the absence of a requirement that the State officials provide assurances of "a 'feasible method' of relocating families and individuals and an adequate supply of standard housing available." [11] It also emphasized the necessity of intelligent planning for relocation needs, but noted that:

> even with advance planning as an essential part of an overall system of minimizing the hardships of displacement, it seems that, at least in the bigger, older, more congested cities, containing the underprivileged, elderly, and non-white particularly, positive measures of relocation assistance and service are indispensable.[12]

The report found that the most serious problems in relocation were the shortage of housing for low income groups and the special burdens found by non-whites, the elderly,

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[9] *Id.* at 106.

[10] Advisory Commission Intergovernmental Relations, *Relocation: Unequal Treatment of People and Businesses Displaced by Government* (1965).

[11] *Id.* at 74-75.

[12] *Id.* at 76.

and those with large families in urban areas.[13] It recommended that the states be required to assure in advance the necessary number of proper housing units to meet the needs of displacees.[14]

In response, the Congress in 1966 ordered the Secretary of Commerce, the department then in charge of highway programs, to make a detailed report of relocation problems and recommended solutions; to be submitted no later than July 1, 1967.[15] The report of the Senate Committee on Publics Works which accompanied the 1966 highway act stated that the operation of 23 U.S.C. §133 "has not been fully satisfactory and effective . . ." The report further expressed the Committee's concern that "the situation has worsened as construction of the Interstate System has moved into heavily developed urban areas."[16] The resulting study, issued by the Secretary of Transportation,[17] restated the problems which were already well known, and urged prompt federal action.[18]

The decade of reform efforts resulted in the relocation provisions of the Federal Aid Highway Act of 1968, 23

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[13] *Id.* at 104-105.

[14] *Id.* at 114-117.

[15] Pub. L. 89-574, §12, Sept. 13, 1966, 80 Stat. 770, *supra* at Br. App. 2-3.

[16] 1966 U.S. Code Cong. & Ad. News 3043-4.

[17] Highway Relocation Assistance Study, 90th Cong., 1st Sess. (1967). (Committee Print No. 9.)

[18] The urgency of federal action was underscored by the projection that between July 1, 1967, and June 30, 1970, 146,950 residential units would be displaced by federally aided highway construction while most of the right of way for the interstate system will have been acquired (although not necessarily cleared) by June 30, 1970. *Id.* at 41. *Cf.* 1968 U.S. Code Cong. & Ad. News 3512.

Appendix C

U.S.C, §501 *et seq.* The committee reports, floor debate, and language of the 1968 amendments all confirm what the history of the previous decade showed—that the relocation amendments were truly "remedial," and their immediate implementation was urgent. During debate on the Federal-Aid Highway Act of 1968, the importance of adequate relocation was continually restated. The relationship of highway displacement to urban unrest was very much in the forefront of Congressional concern. The principal sponsor of the 1968 Act, Senator Jennings Randolph,[19] spoke of the urgent need for a comprehensive highway relocation program:

> Today we are in an urban society . . . These dislocations and displacements caused by urban highways have been the source of much of the discontent and unrest in our cities.[20]

As Senator Randolph continued, immediate action was imperative:

> We cannot wait any longer for this program. There is an urgency about it. I think it is imperative that we move.[21]

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[19] Senator Randolph is from West Virginia, and was undoubtedly aware of the relocation problems in his home state which had already become apparent at the time he spoke.

[20] 114 Cong. Rec. 8037.

[21] *Id.* at 8038. The Senate Report on this act points out:

> The evidence showed also that, because urban interstate highways often go through rundown, dilapidated, low-income or so-called disadvantaged areas, those persons least able to afford dislocation are frequently the ones who are forced to move by our highway programs.

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The language of the Act itself makes clear its remedial and urgent nature. Its "Declaration of Policy," states that the "prompt and equitable relocation" of persons displaced by federal highway construction

> is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.[22]

The Act was declared effective and fully operative on the date of its enactment.[23]

In the face of this legislative history and the requirements of the Act itself, a response to the well documented need for relocation reform to alleviate the human misery and social unrest caused by previous highway displacement, any interpretation which prevents the immediate effective implementation of the Act for the benefit of those who had not yet been moved from their homes at the time of its enactment ought to be soundly rejected.

In this regard it was pointed out that often when persons are displaced from these areas there is no housing or replacement property available for their relocation. People are thus forced to move, but have no place to go; or if other housing or replacement property does exist, it is usually well beyond their financial capabilities. The evidence shows clearly that there is a definite need for procedures which provide for comparable replacement housing and property at the time such displacement occurs.

1968 U.S. Code Cong. & Ad. News 3488. *Cf. id*, at 3512.

[22] 23 U.S.C. §501, Br. App.

[23] Pub. L. 90-495 §37, Aug. 23, 1968, 82 Stat. 831. The one limiting feature in the act provides that until July 1, 1970, it "shall be applicable to a state only to the extent that such state is able under its laws to comply . . ." *Ibid.* Even here, this law was more definite than the earlier one, which a state could avoid completely by failing to enact enabling legislation. 23 U.S.C. §133 (c). Here the states were obliged to conform their laws, if needed, by July 1, 1970, or risk losing the benefits of federal assistance.